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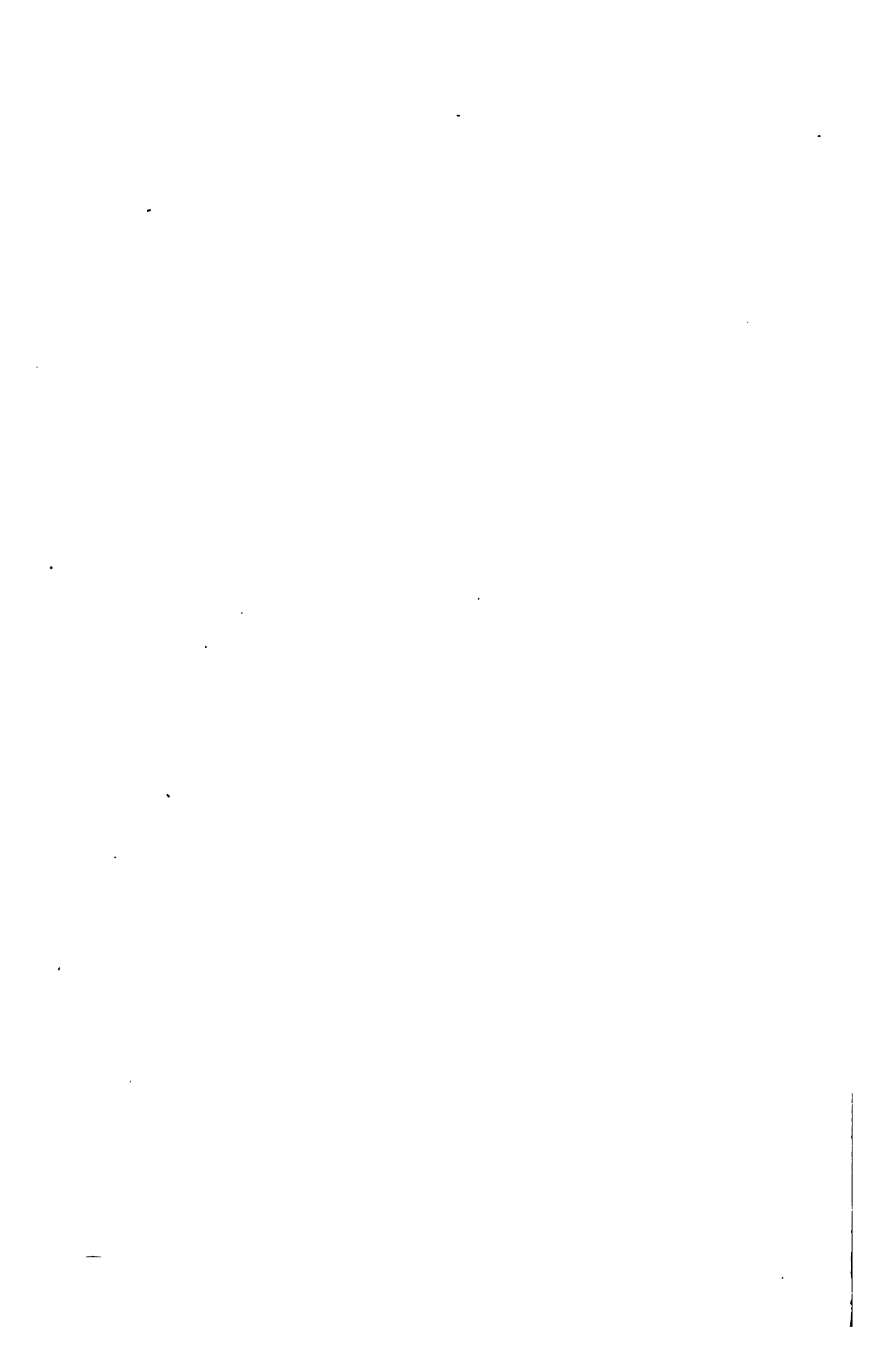
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SURROGATES' COURTS

OF THE

STATE OF NEW YORK,

WITH ANNOTATIONS.

EDITED BY

CHAS. H. MILLS

OF THE ALBANY BAR.

VOL. VII.

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REPORTS OF CASES

ARGUED AND DETERMINED IN

THE SURROGATE'S COURTS

OF

THE STATE OF NEW YORK.

Matter of the Guardianship of LEVI E. PUTNEY, Formerly a
Minor.

(Surrogate's Court, Cattaraugus County, October, 1908.)

GUARDIAN AND WARD—CUSTODY AND MANAGEMENT OF WARD'S ESTATE—EXPENDITURES—EXPENDITURES FOR WARD'S SUPPORT EXCEEDING INCOME.

A Surrogate's Court, upon the judicial settlement of the accounts of a guardian, may make an allowance to him for the expenses incurred in the support of his ward, who was his son, although no order permitting such expenditures had been procured before making them.

After the death of his mother an infant son was cared for by his grandmother without expense to his father until he became three years of age. After his father had married again, the father took the child and from that time on supported and maintained him. When the son was about four years of age the father, who was a man of some means and financially able to contribute toward the support and maintenance of his son, was appointed guardian and received the entire estate of the son, amounting to about \$600, and in none of the annual accountings filed by him did he make any charge of expenses or disbursements incurred for the support of his ward, although he charged himself with sums in excess of the total amount of the estate received by him. Upon the judicial settlement of his accounts, the guardian presented charges against the son for support and mainte-

nance in an amount which, if allowed, would more than absorb the entire estate. Upon the hearing of objections to said items, *held*, that the guardian should not be required to account for the entire estate and should only be required to pay over to the ward the sum of \$200.

Proceedings on judicial settlement of guardian's accounts.

Charles E. Congdon, for petitioner, guardian; Henry P. Nevins, for contestant.

DAVIE, S.—Edwin O. Putney was appointed guardian of the person and estate of his infant son, Levi E. Putney, on the 30th day of September, 1891. The petition alleges that the total estate of said infant, consisting of personal property, did not exceed in value the sum of \$700. The infant, at that time, was of the age of four years, his mother having died in the month of August, 1887.

It appears from the evidence in the case that, after the appointment of the petitioner as guardian, as aforesaid, and about the year 1893, he received the sum of \$570.88, constituting the entire estate of said minor. No other funds, came into the hands of the guardian belonging to said estate.

It does not appear that any application was ever made by the guardian to the Surrogate's Court for permission to use any portion of the principal of said estate for the support and maintenance of said minor. It does appear, however, that, within a comparatively short time after the receipt of the moneys belonging to this estate, the guardian applied the same in liquidation of his own indebtedness and for his own individual benefit. No annual report appears to have been filed by the guardian, pursuant to the requirements of section 2842 of the Code of Civil Procedure, prior to the year 1892. On the 9th day of January, 1893, he did file in the office of the surrogate a report of his proceedings as such guardian for the year 1892, in which he

states that he had received, since his appointment, the sum of \$150, and that the same then remained in his hands. On the 12th day of January, 1894, he filed his report for the preceding year, in which he states that he had received \$1,026.88; that he had loaned upon a note \$170 thereof, and that the balance then remained in his hands. On the 6th day of February, 1895, he filed a report for the year 1894, in which he states that he had received \$1,026.88; that he had loaned \$170 as above stated, and that the balance thereof still remained in his hands; and in the year 1896 he filed a further report, bearing date and verified on the 29th day of January, 1896, in which the guardian states that he had received the sum above named, to-wit, \$1,026.88, and that he had loaned said sum of \$170, and also charged himself with interest on such note to the extent of \$8, but not stating in the last mentioned account that he still retained the funds in his possession. No accounts subsequent to the one last referred to have ever been filed by the guardian, and in none of the accounts filed by him has he reported or made any charge of any expenses or disbursements incurred for the support of the minor. It appears from the evidence that in the annual reports filed by the guardian he charges himself with sums in excess of the entire amount received; that the total amount coming into his hands as such guardian, belonging to the infant, was \$570.88.

In the account filed for judicial settlement the guardian presents charges against the son for an amount which, if allowed, will more than absorb the entire estate and to this portion of the account objections are made; so that the only question raised upon this contest is as to whether the guardian should be allowed the entire funds of the estate or any portion thereof on account of expenses incurred by him in maintaining said minor.

There is no question of the authority of the Surrogate's Court to make such allowances, if the facts disclosed by the evidence justify the same. In the case of *Hyland v. Baxter*, 98 N. Y.

610, it was held that a Surrogate's Court on judicial settlement had the authority and jurisdiction to make an allowance on account of advancements which had been made for the support and maintenance of a minor, although no order permitting such expenditure had been procured from the Surrogate's Court before making the same; and in that case it was held that the question of such expenditure should then be disposed of in the same manner and having in view the same facts and circumstances as if an application had been made.

So, in this case, the question is not one of power or authority, but one of ascertaining what should be done under all the circumstances in the case, in order to reach an equitable disposition of the matter as between the guardian and his son.

As already stated, early in the administration of the estate, the guardian appropriated the entire funds of the estate, not to meeting the expenses of the support and maintenance of the infant, but for his own individual benefit and convenience; and it is by no means apparent that, at the time of making and filing the annual accounts above referred to, the guardian entertained any intention to charge the infant with the expenses of his support and maintenance. The transaction has, to some extent, the appearance of an effort on the part of the guardian, at this late day, to establish a defense against the claim of his son, when, in fact no intention existed in the mind of the guardian to make such charge at the time of the making of any expenditures for the infant.

The infant has no other estate than that which has come into the hands of his guardian, as above stated. He is a young man who has recently become of age, of ordinary intelligence and apparently in fair state of health, and is undoubtedly able, and during several years last past has been able, to maintain himself, or at least to contribute toward the expense of his maintenance. After the death of his mother the infant was taken to the home of the grandmother, where he was cared for by her,

without expense to the guardian, until the infant became of the age of about three years. In the meantime the guardian had married again and the infant was returned to the guardian's home and, from that time on, supported and maintained in a manner usual and customary with people in their station of life. The guardian was a man of some means, having title to a farm in the town of Perrysburg of the value of about \$3,000, and upon which there has existed for several years, and still exists, a mortgage incumbrance to the extent of \$1,000. The guardian has also, during several years last past, derived an income to some considerable extent through his employment by a manufacturing corporation; so that, all things taken into consideration, it seems that the guardian had the financial ability to at least contribute to some extent toward the support and maintenance of his infant son.

The obligation of maintaining a child rests primarily upon the parent, and this obligation includes that of education to an extent consistent with the station in life of the parties. Such was the obligation resting upon the petitioner at the time he received the moneys in question; and it becomes incumbent upon him to show affirmatively such a condition that the court, in the exercise of a reasonable discretion, can say, or should say, that the petitioner was unable to meet such obligation.

I am not satisfied from the evidence in the case that the guardian should be permitted to absorb this entire sum for his own benefit, notwithstanding the fact that he has incurred certain expenses in the maintenance and education of the minor; nor am I prepared to say, in view of the comparative situation of both the petitioner and his son, that the petitioner should now be required to account for the entire sum. I am of the opinion that, under all the circumstances, some allowance should be made from the principal of this estate to the petitioner on account of such care and maintenance.

The said guardian should be required to pay over to his son the sum of \$200 on account of the moneys received by said guardian, as above set forth.

A decree to that effect will be entered.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of ALBERT D. WELCH, as Executor of the Last Will and Testament of MARY F. WELCH, Deceased.

(Surrogate's Court, Kings County, October, 1908.)

SURROGATE'S COURTS—PROCEDURE AND REVIEW—ORDERS AND DECREES—OPERATION AS BAR OR AS CONCLUSIVE EVIDENCE—REMOVAL OF REPRESENTATIVES—ADJUDICATION CONCLUSIVE IN SUBSEQUENT PROCEEDINGS FOR ACCOUNTING.

Where, in a proceeding brought for the removal of an executor, upon the sole ground that he was unfaithful to his trust in respect to certain bonds alleged to belong to the estate, it is adjudged that the bonds at the death of the decedent belonged to the executor individually by way of gift from the decedent, the decree entered in the proceeding is *res adjudicata* upon a motion to confirm the report of the referee by which the account of the executor, which did not include said bonds, was settled, as against the petitioner in the proceedings to remove the executor.

Under the express provisions of the Code of Civil Procedure, it was the duty of the surrogate to find whether the bonds formed part of the decedent's estate, in order to determine whether the executor's conduct merited the revocation of his letters; and the finding in that regard, so far as it was essential, was a bar to any re-examination of the question upon the motion to confirm the referee's report.

Proceeding upon the judicial settlement of the account of an executor.

W. A. Fisher, for executor; Sparks & Fuller, for John Welch.

KETCHAM, S.—Upon a motion to confirm the report of a referee, by which the account of this executor was settled, it is claimed that the referee erred in holding that a former decree in this court affecting this estate was *res adjudicata*.

The account did not charge the executor with certain bonds.

The objectant claims that these bonds belonged to the decedent and formed part of the estate which was committed to the care of the executor. The objection in this respect has been overruled by the referee, on the ground that it was adjudged in a former proceeding that these bonds at the death of the decedent did not belong to her, but did belong to the executor in his own right.

That proceeding was brought upon the petition of the present objectant, praying for the removal of the executor. The sole ground set forth in the petition was that the executor had conducted himself with respect to the bonds in a manner which would be unfaithful to his trust if the bonds belonged to the decedent's estate, but which would be beyond reproach if he were himself the owner of the bonds. The whole complaint of the objectant was based upon the allegations which he made, that the bonds belonged to the estate.

The answer, as the executor's sole defense to the accusation of misconduct, denied that the bonds belonged to the decedent at the time of her decease and alleged that they were given to him by the decedent prior to her death and had ever since remained his own individual property.

The issue thus raised was tried, and the objectant offered his evidence thereon. The court found that the bonds were not owned by the decedent at the time of her death and formed no part of the assets of her estate, but that they belonged to the executor individually. Upon this finding the court concluded and decreed that the executor was not guilty of misconduct and should not be removed.

"The judgment is conclusive only as to facts directly and distinctly put in issue, and the finding of which must be necessary to uphold the judgment. * * * It is conclusive upon every matter actually and necessarily decided in the former suit, though not then directly the point in issue. If the facts involved in the second suit are so cardinal that without them the former decision cannot stand, they must be taken as conclusively settled in the first suit. * * * The judgment is final as to every fact litigated and decided in the action having such a relation to the issue that its determination was necessary to the determination of the issue." These are the tests which in varying language all converge to the point involved in the case at bar. *Shearer v. Field*, 6 Misc. Rep. 189, and cases cited.

The adjudication here involved was reached in a special proceeding, determinable not as a motion, upon affidavits, but upon evidence. *Matter of McGoughran*, 124 App. Div. 312. The rules respecting judgments in actions, therefore, apply.

Whether it was necessary to the solution of the question presented on the removal proceeding to determine that the bonds belonged to the executor need not be regarded. It is enough that there could have been no determination in that case without an answer to the question, Did the bonds belong to the decedent at death? and a judgment embodying such answer is final and conclusive as to the litigants there engaged.

It is said that the surrogate "had no jurisdiction to render any findings or enter any decree determining the title to the bonds," and the objectant invokes the obvious principle that a judgment for which there is no jurisdiction is not a bar.

This proposition is to be considered solely in its relation to the former inquiry, so far as it resulted in a finding that the bonds did not belong to the estate, for it is possible that the finding as to the specific ownership was not material to that inquiry.

To show the whirl of unreason to which the objectant's suggestion tends, it is enough to say that, if the objection to jurisdiction be sound, he himself, upon his petition to remove, would have been forbidden to make proof that the bonds belonged to the estate, and that if his present resistance to the former adjudication was not made or should be overruled he would be met by his own objection, if upon the accounting he should attempt to prove the ownership of the decedent as a ground for surcharging the account. The very question of fact to which the objectant, both in the former and in the present proceeding, claims the right to direct his proof would be excluded.

But the jurisdiction rests upon express grant of the Code. The surrogate has jurisdiction to revoke letters testamentary (Code Civ. Pro., § 2472, subd. 2); to administer justice, in all matters relating to the affairs of decedents, according to the provisions of the statutes relating thereto (Id., § 2472, subd. 6); and to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred (Id., § 2481, subd. 11).

Under the provision last quoted the surrogate, while having no primary power to construe a will of real estate, is granted ample jurisdiction to determine the meaning of such will where such determination is essential to the settlement of accounts or in the consideration of the conduct of executors. In the same grant the surrogate, though devoid of jurisdiction to assay and measure all the rights and liabilities which depend upon an accusation of larceny, forgery or murder, has the duty, in cases easily recalled, of passing upon the existence of any one of these crimes, wherever necessary to carry into effect the powers which are known to reside in the court.

In the case at bar, though the former surrogate could not try a title to the bonds in question and could not give a possessory decree, it was still his duty to find whether the bonds formed part of the estate, in order to determine whether or not the ex-

ecutor's conduct merited the revocation of his letters. And so far as his finding in that regard was essential to his disposition, it is a bar to any re-examination in this proceeding.

The referee's report should be confirmed.

Decreed accordingly.

Matter of the Judicial Settlement of the Estate of JOHN G.
MEUSCHKE, Deceased.

(Surrogate's Court, Rensselaer County, October, 1908.)

EXECUTORS AND ADMINISTRATORS: ARTICLES SET APART AND SUSTENANCE FOR SURVIVOR AND CHILDREN—SUSTENANCE—WHERE WIDOW ACCEPTS DEVISE OF ALL TESTATOR'S REAL ESTATE: DEBTS AND LIABILITIES OF THE ESTATE—EXHIBITION, ESTABLISHMENT, ALLOWANCE AND ENFORCEMENT OF CLAIMS—EVIDENCE—DEGREE AND SUFFICIENCY: RIGHTS AND LIABILITIES BETWEEN REPRESENTATIVE AND ESTATE—ALLOWANCES—IN GENERAL—FUNERAL EXPENSES—MOURNING ATTIRE: HEADSTONE; COUNSEL FEES.

A testator who in his lifetime had never earned large wages devised all his real estate, worth four or five thousand dollars, to his widow absolutely and his personal property, amounting to about two thousand, consisting of money in savings bank. Upon the trial of objections to the account of the executor, held (1) that funeral expenses, \$381.50, contracted in good faith should be allowed; (2) \$50 for headstone allowed, with permission that parties in interest unite in purchasing and erecting a monument according to the proved intention of the deceased, a voucher and proof of which must be filed within three months; (3) attorney's fees of \$100 allowed; (4) \$120 for widow's mourning clothes disallowed, no voucher showing its payment by either the executor or the widow having been filed.

The widow having accepted the devise of real estate had no claim under the Real Property Law for forty days' sustenance, and a charge of \$180 therefor was disallowed.

A claim of the testator's daughter, who was given all the household furniture, for repairs to the real estate, gas and other expenses incurred by the testator and paid by the daughter with money which she had earned, was properly allowed.

A claim of the daughter for money advanced to pay household expenses and money advanced to her mother for clothing disallowed, the evidence showing that the same was voluntarily contributed for family use and, therefore, not a proper charge against the estate.

Objections to the account of an executor.

James Farrell, for executor; Frank E. McDuffee, for legatees.

HEATON, S.—The objections to the account of the executor have been tried on judicial settlement. The testator left a will giving his real estate, worth \$4,000 or \$5,000, to his widow, with all the household furniture, a piano, bed and bedding, bureau and bookcase, to his adopted daughter, and \$300 to each of six classes of collateral relatives, most of whom live in Germany, the same to be paid from the deposit in the savings bank, and the residue of such deposit to his widow.

The account as filed shows money in savings bank received, with interest, \$2,055.60 as constituting all the assets. None of the household furniture or articles specifically bequeathed to the daughter appears in the account. The charges for expenses and debts made by the account may be summarized as follows: Funeral expenses, \$381.50; monument, \$50; expenses of administration, \$123.25; widow's mourning clothes, \$120; widow's sustenance, \$180; widow's set-off (section 2713, subd. 5), \$150; debts, \$521.83.

Objection is made to the allowance of each of the following items: Funeral expenses, \$381.50; monument, \$50; attorney's fees, \$100; widow's mourning, \$120; widow's sustenance, \$180; debt of Alma Meuschke, \$398.65.

The funeral expenses are perhaps larger than were necessary, but they seem to have been contracted in good faith; and, although Mr. Meuschke never earned large wages, yet he had ac-

cumulated from \$7,000 to \$8,000 and was somewhat prominent among his fellow Germans. The objections to the funeral expenses are disallowed.

The item of \$50 for headstone is allowed, with permission to unite with other relatives in purchasing and erecting a monument according to the proved intention of the deceased, a voucher and proof for which must be filed by the executor within three months.

The attorney's charges are allowed.

The item of \$120 for widow's mourning clothes are disallowed.

No vouchers are filed showing its payment by either the executor or the widow. There is no statute permitting the allowance of such an expenditure, but the courts have established the rule. *Allen v. Allen*, 3 Dem. 524; *Matter of Wachter*, 16 Misc. Rep. 137; *Matter of Weaver*, 53 id. 244. The reason for the allowance as part of the funeral expenses is found in the fact that it is the almost universal practice for members of the family of a deceased person to wear mourning; and a change of apparel is thus rendered necessary as part of the preparation for the funeral and as a mark of proper respect for the deceased. This expenditure should only be allowed, however, in behalf of those members of the family for whom the deceased was bound to provide, and should be moderate in amount. The representative should not pay over a lump sum for this purpose but there should be filed with him proper evidence of the exact amount used and for what it was expended, so that he may act with a due regard for the rights of all interested parties. He is as much bound to have before him the items of such expenditure as he is of the funeral expenses proper.

The charge of \$180 for the "widow's sustenance" is not allowed. No vouchers are filed showing its payment by the executor or its expenditure by the widow. There are two provisions of the law for the support of the widow for forty and

sixty days respectively, and these statutes do not seem to be clearly separated when sustenance is spoken of. One is section 2713, subdivision 3, Code of Civil Procedure, where provisions and fuel may be set off for the support of the widow and minor children for sixty days. If such articles do not exist, no money can be allowed in their place. Heaton, Surrogate's Courts, paragraphs 696-699. The other provision is found in section 184 of the Real Property Law, relating to widow's dower, and it provides that the widow may remain in the chief house of her husband for forty days (if she has dower therein) without being liable for rent; "and in the *meantime* she may have her reasonable sustenance out of the estate of her husband." These statutes ought to be construed so that they will harmonize as far as possible. Certainly it was not intended that a widow should be allowed for her support from two different sources at the same time, and yet it is not easy to see how this can be avoided in some instances. Where there are provisions and fuel on hand that can be set off by the appraisers, the widow and minor children are entitled to the same for their support for sixty days. It would seem that this is the only support the widow would be entitled to, unless the deceased left real estate in which the widow had a dower right, in which case, and in which case only, the widow is entitled to sustenance for forty days.

By this will the widow is given all the real estate, absolutely; and, having accepted this provision of the will, she has no claim under the Real Property Law for forty days' sustenance.

The executor has paid a claim presented by Alma Meuschke, the daughter, of \$398.65. This claim is made up of items paid for repairs to the real property, gas and other expenses, incurred by the deceased and paid by the daughter with money earned by her. These items, amounting to \$161.65, are allowed. Matter of Brown, 60 Misc. Rep. 35. The balance of the bill is for \$3 a week advanced by the said daughter to defray household expenses and for \$45 advanced to Mrs. Meuschke for clothing.

The evidence is that Miss Meuschke was employed in a nearby city and came home every Saturday afternoon and spent Sunday with her parents, and at that time bought provisions for family use to the extent of \$3 a week. So far as the evidence goes, these payments seem to have been a voluntary contribution by the daughter for family use and cannot be allowed against the estate of her father under the evidence in this case.

Decreed accordingly.

Matter of the Probate of the Last Will and Testament of
JAMES HUGHES, Deceased.

(Surrogate's Court, King's County, November, 1908.)

WILLS: THE TESTAMENTARY INSTRUMENT OR ACT—REVOCATION AND ALTERATION—RIGHT AND HOW ACCOMPLISHED—CANCELLATION OR OBLITERATION—BY THIRD PERSON: PROBATE, ESTABLISHMENT AND ANNULMENT—PROBATE—IN GENERAL—ESTABLISHMENT OF LOST OR FRAUDULENTLY DESTROYED WILL.

It is essential to the valid revocation of a will by tearing that such act should be done in the presence of the testator.

Where, after the due execution of a last will, the portions thereof which bore the signatures of the testator and the subscribing witnesses were so torn that in each instance the signature was almost entirely removed, and it appears that the mutilation was made, not by the testator but by another person, by his direction and consent, during his lifetime, but not at the time when the direction was given nor in the presence of the testator, and the will remained in the testator's possession from the time of its execution to the time of his death, the removal of the signatures, under the circumstances, did not revoke the will, which was otherwise intact, and it is entitled to probate.

Such a will is not destroyed within the meaning of the statutes respecting the establishment or probate of lost or destroyed wills.

Proceeding upon the probate of a will.

James C. McEachen (Thomas C. Byrnes, of counsel), for proponent; Michael J. Scanlan, for contestants Margaret Miller et al.; Kelaher & Scannell, for contestant Mary Gately.

KETCHAM, S.—The paper propounded was duly executed, published and attested. Thereafter, the portions thereof which bore the signatures of the testator and the subscribing witnesses were so torn from the paper that in each instance the signature was almost entirely removed. The instrument was thus mutilated, not by the testator himself, but by another person, by his direction and consent, during his lifetime. The signatures were not torn at the time when the direction was given, nor were they torn in the presence of the testator. The will remained in the possession of the testator from the time of its execution to the time of his death.

It was essential to a revocation by tearing that the act should be done in the presence of the testator (Statute of Wills, § 42), and the will was not revoked.

The contestants assume that this proceeding is brought for the probate of a destroyed will; and by aid of that assumption insist that the will, even if unrevoked, cannot be admitted, unless it was fraudulently destroyed. It is true that, within the meaning of the statutes respecting the establishment or probate of a will lost or destroyed (Code Civ. Pro., §§ 1862-1865, 2621), a destroyed will must be rejected, unless the destruction was fraudulent. *Timon v. Claffy*, 45 Barb. 438; *Matter of De Groot*, 18 Civ. Pro., 102; *Early v. Early*, 5 Redf. 376; *Matter of Reiffeld*, 36 Misc. Rep. 472. It is also true that a defacement which was done at the testator's direction could not be fraudulent in the ordinary acceptance of the word.

But this is not the case of a destroyed will, unless it can be held that a will once duly executed becomes a destroyed will when it is actually produced, intact in every part except the signatures which were necessary to its execution and attestation, and these signatures are shown to have been removed by a person other than the testator and under circumstances which did not work a revocation.

The provisions for establishment or probate of a lost or destroyed will contemplate only an instrument which is wholly destroyed. This is obvious with respect to a lost will, and the association therewith of a destroyed will, as the subject of a procedure equally applicable to both, affords ground for the construction that in each case a will wholly absent was intended. Better ground appears in the requirement that the provisions of the will, which in the legislative mind is a destroyed will for the purpose of the procedure ordained, must be proved by at least two witnesses, and that a copy or draft of the instrument shall be equivalent to one witness. None of these expressions have any necessity or meaning, if they apply to a will of which all the dispositive features remain.

It is apparent that the ordinary methods of probate, applicable to a will physically propounded, are regarded by the Code as sufficient to cover all cases where the instrument is produced and its provisions can be ascertained from its face. The present Code provisions for the establishment or probate of a destroyed will preserve the procedure which was prescribed under the Revised Statutes, and which existed in the courts of chancery, as to wills of real estate, before the statutes. In none of these conditions of the law has a resort to equity for the ascertainment of the contents of a will by secondary proof been considered necessary, when the will in all its substance has been capable of production as primary proof of its terms.

A will from which had disappeared a substantial portion, carrying away with it words of bequest, was held to be within the provisions relative to the establishment of destroyed wills, and the action was maintained for the establishment of the bequest in question. *Hook v. Pratt*, 8 Hun, 102. The effect of this decision is that the statutory remedy made applicable to a destroyed will is obviously to be extended to portions of a will destroyed, provided such portions partake of testamentary purpose and effect. But this decision affords no support for the

claim that a will from which none of its testamentary features is missing is a destroyed will in the sense of the statute.

The fair interpretation, in the light of the case last cited, is that the action or proceeding to be maintained in the case of destruction relates, in any case, only to provisions from which are to be derived the purposes of the testator. The ordinary methods of probate applicable to a will physically propounded are sufficient to cover all cases where the instrument is produced and its testamentary effect can be ascertained from its face.

In the statute prescribing the means by which a will may be revoked, the terms "burning, tearing, canceling, obliterating or destroying" are found in association; and it is held, for the purposes of the statute, that "destroying" is to be interpreted according to such association and may include the act of partial destruction. But this interpretation depends upon the canon of *noscitur a sociis*, and is effected by a consideration of the purpose of the statute last referred to, for the act by which the physical integrity of the will is affected is made by the statute merely a token of the intention which precedes and accompanies it; and, if the intention required by the statute be found, it is unnecessary to determine the extent to which the will is defaced or whether it is wholly or partially destroyed. A partial as well as an entire destruction may serve as the symbol or consummation by which the purpose of revocation may be evinced. But this construction cannot follow the word into a statute having a different purpose and not presenting the word in a like relation to the other words and to the subject-matter of the enactment. Indeed, the same rule under which words partake of the meaning of others with which they are found would impose upon the word "destroyed," as found in the Code, some of the meaning of its associate "lost;" and, as already said, if one contemplates a will wholly missing, the other does.

In the sections of the Code under consideration the word "destroyed" is used to define conditions with respect to a will which make necessary an action in which secondary proof of its terms may be taken, and here the word obviously must contemplate the destruction of the will to the extent only to which its reproduction by secondary evidence is necessary. Wills, however scarred or defaced, even in their disposing parts, have always been awarded probate without resort to equity, provided their original testamentary substance could be determined by inspection.

This proceeding is for the probate of a will actually exhibited. Its presence indicates that as a will it has not been destroyed. The inquiry as to the signatures which have been removed therefrom concerns only its execution and not its nature as a will, and its probate is not dependent upon the conditions imposed in the sections of the Code which have been considered.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of KATHARINE L. DENHAM, as Substituted Trustee of JOHN OFFICER, Deceased.

(Surrogate's Court, Kings County, November, 1908.)

WILLS—INTERPRETATION AND CONSTRUCTION—DISPOSAL OF THE ENTIRE ESTATE—EFFECT OF DEATH, UNCERTAINTY, ETC.—LEGACIES DEPENDENT ON DECEASE OF ANOTHER.

Where testator devised his residuary estate in trust for his wife during life, with power to use the principal, and directed that upon her death the remainder of the estate should be converted into money and, after a legacy to a niece of his wife and one to his nephew, the estate was given to testator's six children, and the will declares that none of the legacies shall vest until after the decease of testator's wife, the legacy to the niece, who predeceased her, lapsed and returned to the general estate.

Proceeding upon the judicial settlement of the account of a substituted trustee.

Jacob Brenner, for trustee; Frederick H. Jones, for objector.

KETCHAM, S.—The will requiring construction contains a residuary devise in trust for the life of the testator's wife, with a provision that, if necessary, the principal of the trust estate may be used for her maintenance and support. The material expressions following the devise in trust are as follows:

"Fourth. Upon the death of my said wife, and after the payment of her lawful debts and funeral expenses, I direct that all my estate then remaining, including any accumulations which may be thereon, shall be converted into money or its equivalent by my executor then surviving and disposed of as follows:

"To Sarah Johnston, who now resides in Englewood, New Jersey, and who is a niece of my wife, I give and bequeath the sum of Five hundred and ninety-five dollars.

"To my nephew and namesake John Officer hereinbefore named I give and bequeath the sum of Five hundred dollars."

There is, then, a gift of all the "residue" of the estate to six children, to be divided among them equally; but, in the event of the death of any one of them, to be divided among the survivors of the said six children. It is then provided as follows:

"I hereby further declare and direct that none of the legacies hereinbefore bequeathed shall vest in the respective legatees named until after the decease of my said wife. * * * In the event however that either of said six children die prior to the time fixed for the final distribution of my estate leaving lawful issue him or her surviving, said issue shall be entitled to and shall have the share such deceased parent would have taken if living."

The legatee Sarah Johnston, and the wife of the testator died in the order in which they are named. The question is, whether

or not the right of the legatee Sarah Johnston under the will vested upon the death of the testator; or whether, upon her decease prior to that of the widow, her legacy lapsed and returned to the general estate.

The will specifically, and with apparent intelligence and intention, determined that the legacy to Sarah Johnston should not vest until after the decease of the wife. This expression was extended to all of the legatees, with the significant exception that, in the event of the death of any of the six children, the survivors should take, failing issue of the deceased child, and the issue, if any, should take. It is impossible to determine that the language of the will forbidding that a legacy should vest until after the death of the wife has any other than its legal meaning.

Let decree be submitted accordingly.

Decreed accordingly.

In the Matter of the Judicial Settlement of the Account of JOHN W. THOMAS, as Executor of the Last Will and Testament of MARIAN DAVIS, Deceased.

(Surrogate's Court, Kings County, November, 1908.)

WILLS—INTERPRETATION AND CONSTRUCTION—EXPENSES OF THE ESTATE—CHARGES, ETC., AND LEGACIES—RULES AND IMPLICATIONS—IMPLIED CHARGES ON LAND.

Money legacies are primarily payable from the personal estate and remain so unless the will manifests an intention to charge them upon the real estate.

Where, at the time of the execution of a will of one owning no real property, her personal estate amounted to about \$14,000 and the legacies to \$7,700, and no intention to charge the payment thereof upon real estate of which testatrix died seized appears from the will, the personal estate should be applied toward the payment of the legacies ratably.

Proceeding upon the judicial settlement of the account of an executor.

Ralph F. Smith, for executor; William P. Pickett, special guardian.

KETCHAM, S.—The question is presented whether or not the decedent's real estate was, either by her will or by the codicil thereto, made applicable to the payment of so much of certain general legacies of money as her personal estate might fail to pay.

The legacies in the will amounted to \$7,700. When the will was made, the testatrix had no real property. She then had personal property of the undoubted value of \$11,175.38. In addition, she had in possession \$2,924.66, which was the subject of conflict and which, after the making of the codicil, was adjudged not to belong to her.

The legacies were primarily payable from her personal estate and must remain so, unless the intention is made manifest in the will or codicil that real estate of which she might become seized should be devoted to their payment. *Briggs v. Carroll*, 117 N. Y. 288; *McManus v. McManus*, 179 id. 338.

This intention does not appear from the face of the will, nor can it be imported into it by the aid of circumstances attending its execution. There was no inadequacy of personal estate, such as would permit the implication that the testatrix contemplated real estate as a means for the discharge of the legacies. On the contrary, she had no real estate to contemplate, and the value of her personal estate was such as to forbid any finding that she regarded it as insufficient.

It is said that the intention to impress the payment of the legacies upon real estate is made to appear from the power of sale over real estate contained in the will, and from the residuary clause therein which commingles the real estate with the personalty. Either of these features may aid construction in this class of cases, but not unless they are found with an insufficiency of personal assets or some other fact extrinsic to the will

which aids in its interpretation. *Briggs v. Carroll*, 117 N. Y. 288, 292. It cannot be that the power of sale or the blending of the whole estate, by its own force and without resort to surrounding facts, reveals in the will an intention to burden the lands with the legacies.

But it is claimed that when the codicil was made the testatrix did not have personal property equal to the amount of her legacies, and that from this disparity it must result that she intended that the real property, which was then under contract, should aid in the payment of the legacies. Except as to one gift, the codicil did not modify the will. Whatever interpretation now yields as the express or implied meaning of the will, when executed, this codicil preserves and confirms. If, without the codicil, the will, judged by the conditions under which it was made, meant that the legacies were to be paid without resort to the lands, that was the will and that the meaning which the codicil recognized and reaffirmed.

No independent and individual intention to impress the legacies upon the land can be deduced from the codicil itself. It was made under changed conditions when, by its own modification, the legacies were reduced to \$7,300, and the value of the personal estate conceded to be hers was \$6,203.40. From this sum she was about to pay \$1,200 upon the purchase of real estate. At that time her claim to the \$4,387 had been adjudicated in her favor by the former surrogate, the next of kin had appealed from that determination, the administrator had withheld \$4,500 from her share in her husband's estate to await the result of the appeal; and it cannot be found as a matter of fact that she distrusted the judgment which she had obtained and that she excluded the \$4,500 from her estimate of her possessions.

If, therefore, \$4,500, which by the decree of the court belonged to her, be regarded as a part of the resources which she considered applicable to the payment of her legacies, there was

in her mind \$9,503.40 of personal assets for their discharge. There was no contrast then between the amount of the legacies and the value of her personal estate from which it can be said not only that there was a deficiency, but that her appreciation of it was such that she, therefore, must have devoted the real estate which she was about to acquire to the discharge of the legacies. It is not the inadequacy of her personal possessions, but her recognition of it which controls. But, even if the surroundings of the codicil were such that an intention to charge the real estate might have appeared, if an independent will had then been made, it remains that the codicil was not an independent instrument and was only an incident to the will; and a codicil can scarcely contradict the intention of a will which it confirms in all its provisions.

The decree should provide that the legacies be paid ratably from the personal estate.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of JOHN D. SNEDEKER, JAMES H. STOREY and HENRY O. SWENTZEL, as Executor of the Last Will and Testament of HENRY P. MARTIN, Deceased.

(Surrogate's Court, Kings County, November, 1908.)

SURROGATES' COURTS—NATURE AND EXTENT OF JURISDICTION—ADMINISTRATION OF DECEDENTS' ESTATES—ACCOUNTING AND DISTRIBUTION IN GENERAL—ESTATE WHEN READY TO BE DISTRIBUTED.

An estate is "ready to be distributed," within the meaning of section 2743 of the Code of Civil Procedure, when its resources have been gathered and marshaled so that their extent and nature are known and the expenses and obligations of the estate have been ascertained; and the expression "ready to be distributed" does not mean that a direction for the final disposition of the estate can only be made when it has been wholly reduced to money. Where there still remains property which has not been turned into cash, a complete

decree may be made, in which the property may be taken at an estimate of its present value, however nominal or tentative; and, upon a change of circumstances, further direction may be made upon the foot of the decree, the enforcement of which, in the meantime, may be subject to regulation and restraint.

Proceeding upon the judicial settlement of the account of executors.

Edwin L. Snedeker (Edward E. Sprague, of counsel), for executors; Harris & Towne (William H. Harris, of counsel), for residuary legatees; Omri F. Hibbard, for Church Charity Foundation, American Church Building Fund Commission, St. Phebe's Mission and Sheltering Arms Nursery; Henry C. Willcox, for American Surety Company; Davies, Stone & Auerbach (Theodore H. Lord, of counsel), for Domestic and Foreign Missionary Society of the Protestant Episcopal Church of the United States of America.

KETCHAM, S.—The report of the referee is confirmed. Its conclusions involve a credit to the executors for the decrease in value of securities which they have not converted into cash. These securities were appraised at \$609,053, with which sum the executors charge themselves; and they are found by the referee to have been of the value of \$401,966, on November 13, 1907, when the executors' account was filed.

The briefs differ as to the disposition to be made of this proceeding. It is brought for the judicial settlement of the final account, and its only normal result is the ordinary degree of distribution.

The Code provides that: "Where an account is judicially settled * * * and any part of the estate remains and is ready to be distributed to the creditors, legatees, next of kin, husband or wife of the decedent, or their assigns, the decree must direct the payment and distribution thereof to the per-

sons so entitled, according to their respective rights," Code Civ. Pro., § 2743.

The estate is "ready to be distributed" when its resources have been gathered and marshaled, so that their extent and nature are known, and its expenses and obligations have been ascertained. The expression "ready to be distributed" cannot mean that a direction for the final disposition of the estate can only be made when it has been wholly reduced to money. If that were the interpretation, the distribution would be made to await the sale of the last insignificant item of property. Where there still remains property which has not been turned into cash, a complete decree may be made, in which the property may be taken at an estimate of its present value, however nominal or tentative; and, upon a change of circumstances, further direction may be made upon the foot of the decree, while, in the meantime, the enforcement of the decree may be the subject of regulation and restraint.

Let decree be presented stating the account as of the time of its filing and in accordance with the figures contained in the referee's report.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of PAUL SCHNITZLER, as Executor of and Trustee Under the Last Will and Testament of FREDERICK WOLFRAM, Deceased.

(Surrogate's Court, Queens County, November, 1908.)

WILLS—INTERPRETATION AND CONSTRUCTION—DESIGNATIONS AND DESCRIPTIONS OF PERSONS, ETC.—PARTICULAR TERMS OF DOUBTFUL MEANING—HEIRS—UNDER REQUESTS OF PERSONAL PROPERTY.

The word "heirs," when used in connection with personal property, means the next of kin of a decedent or those related by blood who take the personal estate of an intestate.

Where a legacy is given to the "legal heirs" of one, in consideration of her services to testator as housekeeper, her husband is excluded from sharing in the legacy; and it must be distributed among those related by blood to the housekeeper, or her legal next of kin, according to the degree of relationship.

The executor of the housekeeper is entitled to receive the income from the legacy from the date of the last payment to her of the income to the time of her death.

Matter of the judicial settlement of the account of an executor. The opinion states the case.

Edward R. Vollmer, for executor; Ira G. Darrin, for Emile E. Rathgeber, executor of the last will and testament of Lisette Lockstaedt, deceased, et al.

NOBLE, S.—The sixth paragraph of the last will and testament of Frederick Wolfram, deceased, contains the following provision:

"To the legal heirs of Mrs. Lisette Lockstaedt, the sum of \$2,000.00, forever, in consideration of her services to me as housekeeper;"

Said Lisette Lockstaedt received the income of the estate of said deceased up to and including the 1st day of December, 1907; said Lisette Lockstaedt died on or about the 4th day of

April, 1908, leaving a last will and testament, which was duly admitted to probate by the Surrogate's Court of the county of Queens on the 14th day of May, 1908, and letters testamentary thereunder were duly issued to Emile E. Rathgeber, sole executor named in said will.

Said Lisette Lockstaedt left her surviving her husband, Herman Lockstaedt, who is now confined in the Manhattan State Hospital, Ward's Island, in the city, county and State of New York, as an insane person; and Paul Schnitzler, the trustee of Frederick Wolfram, the decedent herein, has been duly appointed as committee for said Herman Lockstaedt.

Said Lisette Lockstaedt also left her surviving her sister, Louisa Stiep, and Ferdinand August Weigle, August Carl Weigle, sons of Carolina Weigle, deceased, who was a sister of said Lisette Lockstaedt, and Annie Weigle, a daughter of Frederick Weigle, deceased, who was a son of Carolina Weigle, deceased. Other than the foregoing, said Lisette Lockstaedt left surviving her no other heirs at law or next of kin.

The rule of construction that has been adopted in this State is that the word "heirs," when used in connection with personal property, means the next of kin of a decedent, or "those related by blood, who take personal estate of one who dies intestate." *Tillman v. Davis*, 95 N. Y. 17.

Section 2514 of the Code of Civil Procedure, subdivision 12, defines "next of kin" as including "all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed residue of the assets of a decedent after payment of debts and expenses, other than a surviving husband or wife."

Therefore, the words "legal heirs of Mrs. Lisette Lockstaedt," used in the sixth paragraph of the will of the decedent herein, must be construed as meaning the "next of kin" of said Lisette Lockstaedt, or those related to her by blood who would share in the distribution of her personal estate had she

died intestate. This, of course, excludes the husband of said Lisette Lockstaedt from any share in the legacy left to her under the will of Frederick Wolfram, deceased; and said legacy should be distributed among those related by blood to said Lisette Lockstaedt, or her legal next of kin, according to the degree of such relationship.

The executor under the last will and testament of said Lisette Lockstaedt, deceased, is entitled to receive the income on said legacy of \$2,000, from December 1, 1907, the date of the last payment to her of such income, to the time of her death, April 4, 1908.

Enter decree accordingly.

Matter of the Probate of the Last Will and Testament of
CHARLES LUTHGEN, Deceased.

(*Surrogate's Court, Kings County, December, 1908.*)

**WILLS—THE TESTAMENTARY INSTRUMENT OR ACT—EXECUTION OF WILL—
EVIDENCE OF EXECUTION—SUFFICIENCY OF EVIDENCE—PUBLICATION.**

Where a will was read aloud to the testator in the presence of both witnesses and the will contained a statement that the testator declared "herewith in the presence of the two undersigned witnesses" that after his death a person named should "inherit whatever estate" he had; and where the testator thereupon signed the will and the witnesses thereupon signed their names thereto, there is sufficient evidence of publication and request by the testator that the witnesses subscribe the instrument.

Proceeding upon probate of a will.

John R. Kuhn (Walter G. Rooney, of counsel), for proponent; Charles W. Philipbar, for contestants.

KETCHAM, S.—The contestants move at the close of the proponent's case that probate be denied, claiming that the testi-

mony of the subscribing witnesses fails to show either publication of the will or a request by the testator that the witnesses sign as such. The instrument was written in German, and its translation is as follows:

"I, the undersigned, Karl Luthgen, born in Lubeck, November 9, 1827, inmate of the Marien-Heim, Brooklyn, since February 1st, 1902, declare herewith in the presence of the two undersigned witnesses, Mrs. Emile Zerboni, Matron of the Home, Heinrich Meyer, inmate of the Home, that after my death the Marien-Heim shall inherit whatever estate I leave.

"I authorize herewith Mrs. Emilie Zerboni to take possession of it.

"Given in the Marien-Heim of Brooklyn,
the 12th of August, One thousand nine
hundred and seven.

"CHARLES LUTHGEN.

"EMILIE ZERBONI,

"HEINRICH MEYER."

Upon a reading of the stenographer's minutes, some testimony does appear tending to show a declaration by the testator. He and the witnesses each entered upon the ceremony of execution with the knowledge that the transaction was testamentary and with the knowledge that the others knew the nature of the act.

The will was read to the testator in the presence of both witnesses; and he said when he signed it that "it was all right;" that "he was satisfied and pleased with it." One witness swears that the testator said that the paper was his will before he signed it. The other swears that, when she and her fellow witness entered the room on the occasion when the instrument was signed, she told Mr. Luthgen that the will was ready and asked him if he was ready to sign it, and he said "Yes." Immediately after the will was made, and before the parties to its

attestation separated the testator said that it was his will and testament.

While, therefore, it cannot be found that there was any word of publication or declaration at the moment of the testator's subscription, the acts and conversation which preceded and followed the testamentary ceremony together justify a finding that there was a declaration at the time of the subscription.

The fact of a request would substantially appear from the same evidence, eked out by the further fact that the witnesses did sign the instrument immediately after the testator signed it. But the request better appears from a circumstance peculiar to this will. When the testator signed the paper, his act was declared to be done "in the presence of the two subscribing witnesses." The will containing the words last quoted had just been read aloud. This act and declaration, made in the presence of those who forthwith became the "two undersigned witnesses," to whom his written declaration referred, must be regarded as a request that they should fulfill the intention which he had confessed by the reading of the instrument and his signature thereto. The request does not less clearly appear than it would if he had orally said: "I am signing this instrument in the presence of these witnesses, and they are about to sign as witnesses as soon as I have signed."

The motion is denied, and the trial may be resumed upon two days' notice.

Motion denied.

Matter of the Probate of the Last Will and Testament of JOHN CUNNION, Deceased.

(Surrogate's Court, Kings County, December, 1908.)

WITNESSES—DISQUALIFICATION BY REASON OF CONFIDENTIAL RELATION—BETWEEN ATTORNEY AND CLIENT—EXECUTION OF WILL—WAIVER OF PRIVILEGE.

In the absence of proof that the nature of a will was referred to in the presence of others at the time of its execution, the testimony of the testator's attorney, who drew the will but did not witness it, as to his remembrance of its contents is inadmissible, under section 835 of the Code of Civil Procedure, as calling for knowledge derived from a communication made by the client in the course of the attorney's professional employment.

The fact of publication of the will to the subscribing witnesses in the presence of the attorney does not constitute a waiver of the prohibition of said section 835.

Proceeding upon the probate of a will.

M. F. McGoldrick, for proponent; Edward S. Keogh, for contestants.

KETCHAM, S.—There is evidence tending to show the due execution of the will propounded. The contestants claim that it was revoked by a later will which was in the custody of the testator during his lifetime, and has not been found since his death.

Upon the examination of the attorney who drew the second will, and was present at its execution, it appears that he gave that will to the testator on the day of its execution; that the testator then took the will "with him," and that the witness remembers its contents. To the question, "I ask you to state the contents, all that you remember?" objection is made that the proposed testimony is inadmissible under section 835 of the Code of Civil Procedure. It cannot be doubted that the

only manner in which the witness derived knowledge of the contents of the will was by a "communication, made by his client" to him in the course of his professional employment. There is no proof that the nature of the will was referred to in the presence of the others at the time of its execution. The proposed testimony is, therefore, within the privilege of section 835, unless there is a waiver of such privilege.

However decisions have varied as to the competency of the testator's attorney to give evidence of the transactions and conditions surrounding the execution of a will, when he has been present during its publication and attestation, their diversity has merely kept pace with the diversity of the statute.

Section 836 of the Code, as it has stood since 1891 (Laws of 1891, chap. 381), provides: "The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. * * * But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate from becoming a witness as to its preparation and execution in case such attorney is one of the subscribing witnesses thereto."

There are thus but two ways by which the force of section 835 can be lessened, either by an express waiver, which, to have any effect, must be made upon the trial or examination and must be made by the client, or by the attorney's act in becoming a subscribing witness to the will.

The cases holding that there was a waiver by the client when he published his will to the subscribing witnesses in the presence of his attorney, arose under section 836 before it required that the waiver should be made "upon the trial or examination." *Matter of Coleman*, 111 N. Y. 220. In that case it was said of section 836: "By that section the pledge of

secrecy imposed by the statute is to be observed, unless its provisions 'are expressly waived' by the client. There is nothing in this section requiring the waiver to be made in writing, or in any particular form or manner, or at any particular time or place; but it is required to be an express waiver, and made in such manner as to show that the testator intended to exempt the witnesses, in the particular instance, from the prohibition imposed by the statute."

Under the amendment made since the decision last cited, there is a particular time and place, to wit, "the trial or examination," prescribed by the statute at which the waiver must be made in order to escape the prohibition of section 835; and in the case at bar the attorney's lips remain under the seal of the statute as to all that took place at the testamentary transaction, since he is not a subscribing witness and there is and can be no express waiver upon the trial such as is contemplated by section 836. If the present statute forbids his testimony as to the testamentary act and its surroundings, it must necessarily forbid his disclosure of the contents of the will, whether the same was published at the time of the execution of the will, or his knowledge thereof had been derived from the consultation which preceded the testamentary transaction.

But, even if the lawyer's evidence as to the facts and circumstances which surrounded and characterized the testamentary act were admissible, it would not follow that he could testify as to the contents of the will. His testimony would be permitted only on the theory of waiver, and that waiver would necessarily be based upon the proposition that, if the testator discloses his affairs to persons who are not only strangers to his confidence, but are requested by him to make proof of the disclosure, the communication is made upon the same terms to all who hear it, and there is an implied direction that the attorney shall, equally with the others, give evidence of the transaction.

But such waiver would necessarily coincide with the nature and limits of the communication. In making his will, this testator published its existence, but did not publish its contents. Hence, if the lawyer were competent to disclose the facts laid open during the testamentary ceremony, he would remain incompetent as to the provisions of the will, since his knowledge thereof came to him under the sanctity of consultation, and its contents were not made the subject of any discovery or waiver outside the counsel chamber.

The objection is sustained, and the trial of the cause may be resumed upon two days' notice.

Decreed accordingly.

Matter of the Probate of a Paper Writing Propounded as the Last Will and Testament of FREDERICK S. SALISBURY, Deceased.

(Surrogate's Court, Westchester County, December, 1908.)

WILLS—INTERPRETATION AND CONSTRUCTION—TERMS DEFINING THE NATURE AND QUALITY OF ESTATES OR INTERESTS—FUTURE INTERESTS AND VESTING POSSESSION AND ENJOYMENT—GENERAL RULE AS TO VESTING; BEQUESTS AT A FUTURE TIME OR ON FUTURE EVENT.

In the interpretation of wills the court should adopt the construction, whenever possible, which will avoid intestacy and which is most favorable to the vesting of the estate devised and which will avoid the disinheritance of the remainderman who dies before the termination of the life estate, unless it appears from the context of the will that the testator had a different intention.

Where a testator gives the residue of his estate to his wife during the term of her natural life, and on her death he gives the same to his children "equally, share and share alike and to the survivor of them, the issue of any deceased child however to take the share of its parent would have taken if living at the time of my wife's decease," and it clearly appears from the context of the will that the time of the vesting of the remainder is after the death of the wife, unless both chil-

dren of the testator and any issue they may have shall die before her, in which event the wife takes the whole estate absolutely; and, no matter in what order the parties interested may die, there is an absolute disposition of the entire estate and no intestacy arises.

Proceeding upon the probate of a will.

Rounds, Hatch, Dillingham & Debevoise, for petitioner; Edward A. Pfeffer, for respondent; Clinton T. Taylor, special guardian.

MILLARD, S.—Frederick S. Salisbury died on the 14th of June, 1908, a resident of the village of Larchmont, county of Westchester and State of New York.

He left a last will and testament, which was duly filed for probate on the sixth day of July last; and upon the 9th of July, 1908, an answer was filed by Maude Grosvenor Salisbury Shriver, a daughter of said deceased, asking for a construction of said will, as to the rights of the parties interested under the third paragraph thereof.

This paragraph reads as follows:

“Third. All the rest, residue and remainder of my estate both real and personal of whatsoever kind and wheresoever situated, I give, devise and bequeath to my beloved wife Lucy Aletta Salisbury, To have and To hold the same and to collect, receive and enjoy the rents, income and profits thereof during the term of her natural life, and on her death I give, devise and bequeath the same to my children Adelene Salisbury and Maude Grosvenor Salisbury equally, share and share alike and to the survivor of them, the issue of any deceased child however to take the share its parent would have taken if living at the time of my wife's decease.”

“And in case neither of my said children shall survive my said wife or shall have died leaving no lawful issue surviving, then I give, devise and bequeath all my estate, both real and personal, to my said wife absolutely.”

The daughter referred to in the will as Maude Grosvenor Salisbury married, prior to the death of the testator, and at that time had a daughter living, born on the 6th of July, 1903.

By an order duly made by me on the 10th day of July, 1908, upon the petition of Lucy A. Salisbury, said infant, Ruth S. Shriver, was made a party to this proceeding; and a citation was duly issued to the said infant to attend the probate of the last will and testament; and, upon the return day thereof, July 20, 1908, Clinton T. Taylor was duly appointed special guardian for the said Ruth S. Shriver, to take care of and protect her interests in this proceeding.

The claim of the respondent, Maude Grosvenor Salisbury Shriver, is that the true construction and effect of the dispositions and provisions of the third paragraph of the said will is that all of the said residuary estate is given absolutely to said Adelene Salisbury and Maude Grosvenor Salisbury Shriver, if they survive the testator Frederick S. Salisbury, subject only to the life interest of Lucy A. Salisbury, the widow; and that said interests of Adelene Salisbury and Maude Grosvenor Salisbury Shriver are not subject to be diminished or divested by any death occurring after said testator's death; and that said dispositions and provisions give to children of said Adelene Salisbury and Maude Grosvenor Salisbury Shriver no interest in said residuary estate, unless one or both of said Adelene Salisbury and Maude Grosvenor Salisbury Shriver should die before said testator.

On behalf of the special guardian, it is contended that no such construction can be given to this clause of the will; that it plainly appears from the language used in said will that the intention of the testator was not to vest the residuary estate in the said Adelene Salisbury and Maude Grosvenor Salisbury Shriver, unless they outlived their mother; that their interest is a contingent and not a vested one and that at this time it is impossible to tell who is to take said estate because it can only

be definitely determined upon the death of the widow, Lucy A. Salisbury, unless both children of the testator and any issue they may have shall die before said widow.

The widow and the daughter Adelene Salisbury have filed a consent that the will be construed in accordance with the answer filed by the other daughter Maude Grosvenor Salisbury Shriver, but I attach no importance to this and cannot see how the consent or failure to consent of interested parties could in any way change the construction or meaning to be given to words used in a will. These must speak for themselves; for, if this were not so, then, by consent of the parties, this court would be able to make an entirely different disposition of a testator's estate than that which he intended and which he evidenced by the will itself executed by him. Besides in this case the infant is a party and has not and cannot consent to a construction different from that warranted by the language of the will.

Many cases have been before the courts for construction of wills and many questions of law have been definitely decided and are now no longer the subject of argument. It is well settled that the court should adopt the construction whenever possible which will avoid intestacy, and which is most favorable to the vesting of the estate devised, and which will avoid the disinheritance of the remainderman who happens to die before the termination of the life estate, unless it appears from the context of the will that the testator had a different intention. *Matter of Russell*, 168 N. Y. 175; *Connelly v. O'Brien*, 166 id. 406; *Matter of Brown*, 154 id. 313; *Hersee v. Simpson*, id. 496; *Corse v. Chapman*, 153 id. 466; *Campbell v. Stokes*, 142 id. 23; *Hang v. Schumacher*, 166 id. 506; *Nelson v. Russell*, 135 id. 137; *Moore v. Lyon*, 25 Wend. 119; *Davidson v. Jones*, 112 App. Div. 256; *Lyons v. Ostrander*, 167 N. Y. 135.

But I am unable to find in this will any possible contingency which is not provided for and which would allow the testator to die intestate as to any of his property. No matter in what

order the parties interested may die, I find in the will an absolute disposition of the entire estate and cannot see how any intestacy could ever exist.

The possible intestacy suggested by the attorney for the respondent, Maude Grosvenor Salisbury Shriver, is that, if a daughter should die before the widow, leaving issue, and then the other daughter and all the issue should also die, there would necessarily be an intestacy of the whole estate; for the widow cannot take under the last clause, as the daughter left issue, and there is no one, at the widow's death, who can take under the will.

I cannot read such an intention from the will, but believe the last clause of the third paragraph means that, in case neither of my said children shall survive my said wife or shall have died leaving any lawful issue surviving her (my said wife), then I give, devise and bequeath all my estate, both real and personal, to my said wife absolutely; or, in other words, if both of my children and all of their issue should die before my wife, then my wife is to take my whole estate.

I have seldom read a will in which the intention, to my mind, was more clearly expressed, where the testator sought to dispose of his property under all conditions which might arise, so that his immediate family might receive the benefits thereof. He certainly had a right to postpone the vesting of the estate, and I cannot see how he failed to clearly show this intention or how he could have done it better than he did. His intention as I read it from the will was:

First. To give his wife the use of the entire residuary estate during the term of her natural life, and upon her death his two children were to share the estate equally, and in case of the death of either without issue the surviving child should take the whole, and if the deceased child left issue then the issue was to take the parent's share. Then again still further he provides what should be done with the estate in case both

of his children were dead before his wife and without leaving issue, viz: that his wife should take it absolutely.

In this construction, instead of being ambiguous, complicated, uncertain, unjust, inconvenient, unnatural and contrary to the prescribed intention of the testator, and not justified or supported by the wording of the will, as is claimed by the respondent, I see nothing but a most comprehensive and careful disposition of the testator's estate, carried out in such a way that his immediate family obtains the benefit of his entire estate during the lifetime of any of them; and, finally, if all the other members of his immediate family should die, leaving his wife as the sole survivor, it gives her the entire residuary estate. What more sensible conclusion and disposition could be made by any one?

The respondent contends that "the adverbs of time, such as 'when,' 'then,' 'after,' 'from and after,' etc., in a devise of the remainder limited upon a life estate are to be construed as relating merely to the time of enjoyment and not to the time of its vesting in interest" and "that words of survivorship and gifts over on the death of the former beneficiary are construed, unless a contrary intention appears, as relating to the death of the testator." While both of these contentions, unless a contrary intention appears from the will, are true, neither of them has any force in this case because it clearly appears from the context of the will that the time of vesting is after the death of the wife, unless both children of the testator and any issue they may have shall die before her, and that her death and not the death of the testator is clearly fixed in said instrument. If the provision of the will to be construed was all of the first paragraph of the third clause of the will, except the last line (*at the time of my wife's decease*), then in the light of the decisions I might feel disposed to hold that the interests of the children were vested. But, when the provision is, as we have it here, that the wife shall have the use of the property

during her life "and on her death I give, devise and bequeath the same to my children Adelene Salisbury and Maude Grosvenor Salisbury equally, share and share alike and to the survivor of them, the issue of any deceased child however, to take the share its parent would have taken if living, *at the time of my wife's decease*," it shows conclusively that the testator's intention was that his children should take no interest, unless living at the time of his wife's death. This would be the common and ordinary meaning of such language, and I am sure that, used by a layman, as in this case, no other meaning could be attached to it. But if we were in doubt, even as to this, the next paragraph of the third clause of the will, "And in case neither of my said children shall *survive my said wife* or shall have died leaving *no lawful issue surviving*, then I give, devise and bequeath all my estate, both real and personal, to my *wife absolutely*," makes it still plainer.

The addition of this last section shows that the testator had in his mind that the former section had not disposed of his property under all conditions, and he therefore made this provision which would provide for the contingency not provided for in the other paragraph. The intention to vest the estate in his wife absolutely, upon the death of his last surviving descendant, could not be more clearly shown.

The rule that in case of a devise to one person in fee, but in case of his death to another, the death referred to will be construed to be a death in the testator's lifetime, has no application where a point of time for distribution is mentioned other than the death of the testator, or where a life estate intervenes, or where the context of the will contains language indicating a contrary intent. *Matter of Baer*, 147 N. Y. 348; *Matter of Denton*, 137 id. 433; *Lyons v. Ostrander*, 167 id. 135.

These cases clearly indicate the distinction from the general rule, namely, that another time is fixed in the will and that the context thereof shows a contrary intent.

In *Davidson v. Jones*, 112 App. Div. 258, the court, referring to the case of *Lyons v. Ostrander*, maintains that that decision is not contrary to the other decisions of the Court of Appeals, but that all of them are in harmony, and shows that the distinction is that they find in the *Ostrander* case expressions showing the intent of the testator to postpone the vesting of the remainder created by him.

So, in this case, it is absolutely plain that the testator fixes and indicates a different time for the vesting of his estate than immediately upon his death.

If the respondent's contention here was correct, that immediately upon the testator's death the estate was vested in his children, then no possible force or meaning could be given to this last section of paragraph third; because, if the property were vested in the children, it could not be given to the widow absolutely.

It is plain to me that the testator has made a valid disposition of his property; that his intention is plain; that the wife takes a life estate; that his children if they survive the wife become vested with the property; that if either of them is dead leaving issue that that issue takes the parent's share; that the survivor of the two children takes the share of the one who has died, provided no issue is left, and that, if both children are dead and any issue which they may have had shall die before the widow of the testator, she takes the whole estate absolutely.

Decreed accordingly.

Matter of the Probate of the Alleged Last Will and Testament
of THOMAS NEARY, Deceased.

(*Surrogate's Court, Saratoga County, December, 1906.*)

WILLS—THE TESTAMENTARY INSTRUMENT OR ACT—EXECUTION OF WILL—
EVIDENCE OF EXECUTION—SUFFICIENCY OF EVIDENCE.

Where an instrument offered for probate has no attestation clause and it appears that the testator was a miller and the witnesses were engaged in trade or manufacture and none of them are shown to have had knowledge of the requirements necessary for the due execution of a will and the proof stops with *prima facie* evidence of the genuineness of the signatures of the testator and the subscribing witnesses and that the instrument was in the handwriting of the deceased, the proof fails to establish facts showing due execution and publication of the instrument as a last will and testament, and probate will be denied.

Proceeding upon the probate of a will. The opinion states the case.

Irving W. Wiswall, for Catharine Sarsfield, petitioner; MacLean & Neary, for John Neary, contestant.

OSTRANDER, S.—This is a proceeding for the probate of an instrument bearing date March 14, 1907, alleged to be the last will and testament of Thomas Neary, deceased. The instrument consists of half a sheet of note paper which purports to be signed by Thomas Neary and witnessed by E. G. Munson and Charles White. The testator, Neary, and both the witnesses are dead. The instrument contains no attestation clause.

It was stipulated upon the hearing that the alleged testator died July 7, 1907, being at the time of his death a resident of the town of Waterford, Saratoga county, and that he left him surviving, as next of kin and heirs at law, the petitioner, Catharine Sarsfield, Margaret Wallace and John Neary.

Proponents give testimony tending to show that the will was in the handwriting of Thomas Neary, and that the signature thereto was his genuine signature, and that the signatures of the witnesses were in their genuine handwriting; and, for the purposes of this motion, those facts are assumed to be true.

No further proof was given as to the circumstances concerning the execution of the instrument. There was no proof as to the mental soundness of Thomas Neary, or his freedom from restraint, at the time of the execution of the instrument in question, nor of any publication of the instrument, except such, if any, as may be drawn by inference and presumption from the foregoing testimony and from the paper itself, which was in the following form:

" March 14, 1907.

"In case of death I hereby give all my belongings including money I have deposited in Bank as well as all other moneys belonging to me to my sister Catharine Sarsfield. The money and whatever personal effects I have at my death shall be used by Catharine Sarsfield during her life as she may direct and at her death she is at liberty to distribute whatever remains as she pleases.

" THOS. NEARY.

" Witnesses

" E. G. MUNSON.

" CHARLES WHITE."

At the close of proponent's case, contestants moved for dismissal of the proceedings and a decree denying probate.

There was no proof as to the custody of the alleged will, except that Mrs. Sarsfield, the petitioner herein, with whom deceased resided for some years, showed it to the witness Wallace some time prior to the beginning of this proceeding.

The Code provides (§ 2623), "If it appears to the surrogate that the will was duly executed; and that the testator, at the time of executing it, was in all respects competent to make

a will, and not under restraint; it must be admitted to probate, as a will valid to pass real property, or personal property, or both as the surrogate determines, etc."

It has been held under this section that the proponent has the affirmative of the issue and that these facts must be affirmatively proved before the will may be admitted to probate, and that, while there is a presumption that every man is sane, this presumption is not enough, in view of the Code section referred to, to be the basis of a finding that the testator, at the time the alleged will was made, was competent to make it, and not under any restraint. *Matter of Schrieber*, 112 App. Div. 497; appeal dismissed, 185 N. Y. 610; *Matter of Goodwin*, 95 App. Div. 184; *Heaton Sur. Pr.*, ¶ 310, and cases cited; *Kingsley v. Blanchard*, 66 Barb. 317-322.

If an inference of mental capacity may be drawn, as suggested in *Kingsley v. Blanchard*, from the apparently intelligent provisions of the instrument written by Neary, yet the paper does not furnish any evidence of freedom from restraint.

Section 2620 of the Code provides that if "a subscribing witness has forgotten the occurrence, or testifies against the execution of the will; the will may nevertheless be established, upon proof of the handwriting of the testator, and of the subscribing witnesses, and also of such other circumstances, as would be sufficient to prove the will upon the trial of an action."

It will be noted that in the case at bar the proof stops with *prima facie* evidence of the genuineness of the signatures of the deceased and the subscribing witnesses, and that the will was in the handwriting of the deceased, and no evidence is given of such other circumstances as would be sufficient to prove the will upon the trial of an action.

I think the most that can be drawn from all the circumstances of the case is that the testator knew the character of the instrument which he signed and was of proper age and capacity; but it does not appear that he had any knowledge of

the requirements necessary for the due execution of a will, or that such requirements were complied with. He was a miller and is not shown to have had any knowledge of the statute, nor is it shown that either of the subscribing witnesses had any such knowledge. They were persons engaged in trade and manufacture and not persons learned in the law.

I think the proof fails to show freedom from restraint of the testator and fails to establish the facts showing due execution and publication of the instrument to entitle it to be admitted to probate as a will to pass real or personal property, and that probate thereof should be denied.

Let a decree be entered accordingly.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of CARL KLEEMAN and JAMES E. WIGHT as Executors of the Last Will and Testament of CONRAD GUTGESELL, Deceased.

(Surrogate's Court, Kings County, December, 1908.)

WILLS—INTERPRETATION AND CONSTRUCTION: TERMS FIXING PLURALITY OR SEVERALTY OF OWNERSHIP OR RIGHT—PARTICULAR WORDS OF DOUBTFUL MEANING—GIFTS TO ONE AND CHILDREN OF ANOTHER EQUALLY—PER STIRPES OR PER CAPITA: DISPOSAL OF THE ENTIRE ESTATE—EFFECT OF DEATH, UNCERTAINTY OR INVALIDITY OR INCAPACITY OF LEGATEES OR DEVISEES—EFFECT OF DEATH OF BENEFICIARY IN LIFE OF TESTATOR—DEATH OF REMAINDERMEN OR OTHER PERSONS TO TAKE IN FUTURE.

Under a will which gave to the testator's deceased wife's brother the use of a house and lot during life and after his death the house and lot were to be sold and the proceeds divided "between" the testator's wife's brother B, and the children and grandchildren of her deceased sister, C, the devisees take *per capita* and not *per stirpes*.

Where the executors were directed to sell the house of testator as soon as convenient at private sale or public auction and divide the proceeds into three parts, one of which was bequeathed to testator's brother, the second part to his sister and the third part to two children of a deceased brother, upon the death of the sister before the testator her legacy lapsed and as to her share the testator died intestate.

Proceedings upon the judicial account of executors.

W. H. Garrison (James C. Cropsey, of counsel), for executors; Hurry & Dutton, for respondent Estelle L. Hulse; Edward J. Fanning, special guardian.

KETCHAM, S.—The will is in part as follows:

“Fourth. I give to my deceased wife's brother, Alfred Brett, my house and lot located in Mill street Matteawan Dutchess County N. Y, for his use of his natural life. After his death said house and lot to be sold and the proceeds divided between my wife's brother Frank Brett of Chicago and the children and grandchildren of my wife's deceased sister Adeline Churchill of Manhattan Borough.

“Fifth. I direct my executors to sell my house in St. Marks Place No. 119, as soon as convenient, at private sale or public auction and divide it with remaining personal property into three parts. One part of these I give and bequeath to my brother Josef Gutgesell, the second part to my sister Margaret Kalb and the third part to the two children of my deceased brother, Herman Gutgesell and Maria Zagel.”

The will contains a power in the executors to sell real estate. One question is whether the proceeds of the sale contemplated in the fourth paragraph are to be distributed to the wife's brother, and the children and grandchildren of the wife's deceased sister per capita or per stirpes.

A devise to one person named and to others indicated generally as children of another person is a disposition per capita, unless a contrary intention can be extracted from the will. *Ferrer v. Pyne*, 81 N. Y. 281; *Vincent v. Newhouse*, 83 id. 505. This rule has been accepted with distrust and reluctance in this State, and our courts have permitted it to survive only within the limitation that it will not be followed if there is “a faint

glimpse of a different intention manifested in the will." Cases cited *supra*, and *Woodward v. James*, 115 N. Y. 346; *Bisson v. West Shore R. R. Co.*, 143 id. 125.

This does not mean that a stray glimmer of the contrary intention from one corner of the will shall supply the only light under which construction shall proceed. The will must be read in all the light which its contents may yield and only when the reluctant ray, however, faint, reveals any intention to provide for the *per stirpes* distribution is the general rule to be escaped.

It is insisted that the direction in the fourth paragraph, that the distribution shall be made "between" persons, more than two, carries the narrower grammatical meaning that the distribution shall be by the twain and indicates a purpose that the wife's brother shall have one-half and the remaining beneficiaries shall have the other half among them.

This argument overworks the word "between." In spite of its primary meaning it is often made to express the idea of distribution among more than two, not only in common discourse, but by writers of good English. The fourth paragraph itself indicates that the testator contemplated a distribution among individuals and not classes, and that the fact of a distribution along lines of race was not in his mind. Not only the children, but the grandchildren, of the deceased sister are included in the provision; and it is within the beneficial purpose that a grandchild, whose parent is living, shall take a share equal to its parent's share. It cannot be imagined that the idea of representation by stock was in the mind of a testator whose will ordained that the ancestor of the stock should share equally with his descendants.

In the fourth and fifth paragraphs, the testator deals with two funds substantially alike in their nature and in their relation to his general estate. The beneficiaries named in each paragraph bear a like, though not identical, relation to each other and to the testator's grace and consideration.

If, then, the will surrounds one fund with apt and deliberate expressions which manifest a desire that it shall not be disposed of under the *prima facie* rule and refrains from similar expressions with regard to the other fund, one fund is manifestly outside the general rule, where the testator has placed it, and the other within its control, where he has left it.

In the fifth paragraph, one of these funds is divided into three portions, so that, of four persons, two shall receive one-third each and the other shall go to two persons representing the stock of the testator's deceased brother.

Here is a determined purpose, wrought into precise language, that as to the fund in question the division is not to be proportioned to the number of beneficiaries. No such purpose is expressed in the fourth paragraph. None is implied in that paragraph, unless it be by the word "between." That implication is not the necessary result of the word, and, even if it were, its intimations would be too slight to prevail over the manifest intention to the contrary, which is derived from the other parts of the will hereinbefore considered.

The remaining question is presented by the fact that Margareta Kalb, to whom in the fifth paragraph was given one-third of the proceeds to be derived from the sale of real estate, died before the testator. Upon her death the provision in her behalf lapsed, and as to the share covered thereby the testator died intestate. Real Prop. Law, § 56; *Matter of Wells*, 113 N. Y. 396; *Matter of Kimberly*, 150 id. 90.

The decree should conform to these views.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of MARIA LOUISE HARRIS and HENRY C. BAINBRIDGE, as Executors of the Last Will and Testament of HANNAH MARIA BAINBRIDGE, Deceased.

(Surrogate's Court, Kings County, December, 1908.)

EXECUTORS AND ADMINISTRATORS—RIGHTS AND LIABILITIES BETWEEN REPRESENTATIVE AND ESTATE—ITEMS CHARGED OR CREDITED—COSTS IN ACTION BY SURVIVING PARTNERS.

WILLS—INTERPRETATION AND CONSTRUCTION—TERMS CREATING LEGACIES AND GIFTS OF INCOME, INTEREST, SUPPORT AND RELEASES OF DEBTS—RULES AND IMPLICATIONS—LEGACIES FOR SUPPORT.

Trust provisions for maintenance when found in wills are usually construed to intend the application of the income from the time of the death of the testator.

Where the residuary estate of a testatrix was devised and bequeathed to three daughters and two sons in equal shares, and by a codicil she directed that from the share of the sons and two daughters there should be equally deducted such a sum as would, if added to the share to be received under the residuary clause by the other daughter, make up the sum of \$10,000 and that such sum so deducted in equal portions from the shares of the other four children should be held in trust by the executors during the life of said daughter or until she should marry, the income thereof to be paid to her quarterly until her death or marriage, the intent and purpose of the trust was to secure the maintenance of said daughter during her life unless she married and the trust fund should be computed upon the net principal of the estate as of the time of the death of the testatrix, and the executors should pay to themselves as trustees such part of the income as should bear to the whole income the same proportion as the trust fund bore to the entire net principal, and should pay the same over, as trustees, to the beneficiary.

Where a judgment, in an action brought by the surviving partners of a firm of which decedent was a member at her death, provided that costs be paid out of the partnership assets in the hands of the surviving partners after deducting therefrom the sums payable to decedent's estate, the payment by her executors of a part of such costs will be disallowed upon the judicial settlement of their accounts, as such costs were to be borne by the plaintiffs in the action as legal owners of the partnership assets to which the executors of decedent

had no legal relation except the right to payment of such sums as, upon an accounting by the surviving partners, might appear to be due to decedent's estate.

Proceeding upon the judicial settlement of the accounts of executors.

Walter R. Davies, for executors and trustees; Harrison, Elliott & Byrd (William Byrd, of counsel), for John C. McKennie, as executor, etc., of Mary J. C. McKennie, deceased; Rollins & Rollins, for Carleton Bainbridge, a legatee; William P. Pickett, special guardian.

KETCHAM, S.—The third paragraph of the will is as follows:

“Third. All the rest, residue and remainder of my estate, I give, devise and bequeath to my children, Mary Jane C. McKennie, William W. Bainbridge, Maria Louise Harris, Charles Edward Bainbridge and Lucy Anna Bainbridge, to be divided between them equally.”

The second codicil provides:

“I direct that from the shares devised and bequeathed by me in and by the 3rd clause of said Will to my children, Mary Jane C. McKennie, William W. Bainbridge, Maria Louise Harris and Charles Edward Bainbridge, or to their children &c., there shall be equally deducted such a sum as would, if added to the share to be received by my daughter, Lucy Anna Bainbridge, under said clause, make up the same to the sum of Ten thousand dollars, and that such sum, so deducted in equal portions from the said four shares first above mentioned, shall be held in trust by my executors during the life of my said daughter, Lucy Anna, or until she shall marry, they paying her the income thereof in quarterly payments until she shall die or marry.”

The accountants in this proceeding present all that is necessary for the adjustment of their rights and duties either as executors or as trustees under the codicil.

They insist that the trust fund should be calculated upon the gross value of the estate as it stood at the death of the testatrix, without deduction for debts or expenses of administration.

Against this it is contended not only that the trust fund cannot be set apart until the net amount of the estate be ascertained by a decree in this proceeding, but that in the amount of the estate upon which the trust fund is calculable must be included the increase which has accrued during the four years of administration.

The truth lies midway of these propositions.

The calculation of the trust fund cannot be made upon the assets as they were at the time of death, for that would take no account of the burdens of the estate which executors must discharge. The fund from which the trust fund is to be derived is the residue, and the residue is that which remains after administration.

There is no way by which this residue, or the trust fund as a part thereof, can become known except by the balancing of the executors' accounts.

"An executor cannot be held to hold a fund as trustee until the trust has been in some way legally ascertained, identified and separated from the general funds of the estate, and the trustee has entered upon the duties of his office as trustee as distinct and separate from his functions as executor." *Matter of Williams*, 26 Misc. Rep. 686, and cases cited.

But this is far from saying that the trust fund is to be computed upon all the moneys, both principal and interest, which are found to constitute the balance of the estate. The purpose of the trust was to secure the maintenance of the beneficiary during her life, unless she should marry. It was within the in-

tent of the codicil that she should be maintained during each of the four years first following the decedent's death no less than during any later part of her life.

The codicil provides that the trust estate shall be held in trust during "the life of my said daughter." This means during each year of such life, from the beginning of the trust, and the trust begins at the death of the testatrix, to which time the will relates back.

Trust provisions for maintenance, when found in wills, are usually construed to intend the application of the income from the time of death; and it is plain that this codicil was inspired by solicitude for the daughter who, of all the children of the testatrix, most needed its provision.

That the design of the instrument was the maintenance of the beneficiary appears in the direction that the income be paid quarterly and that the trust should cease upon the death or marriage of the beneficiary. This daughter, so long as she remained unmarried, was preferred in her mother's providence over sons who were able to help themselves, and daughters whose husbands were able to help them.

"Where the interest or income, in trust, is to be applied to the use of a person, such person is entitled to interest from the death of the testator." *Cooks v. Meeker*, 36 N. Y. 15; *Rodman v. Fincke*, 68 id. 239.

This is especially true of a trust for support and maintenance where it can be seen that the testamentary intent can only be fulfilled by the application of income from the beginning of the trust period. Both cases last cited make it plain that neither the rule nor its reason is affected by the mere fact that the amount of the trust provision cannot be known at the death of the testator.

In *Rodman v. Fincke*, *supra*, a trust was created as to the proceeds of the sale of lands if they amounted to \$30,000, and it was provided that, if the proceeds did not equal that sum, there should be added thereto, out of the residuary estate, a sum

sufficient to make up the difference. The deficiency occurred and the fund was re-enforced from the general estate. The question was presented whether, upon the sum taken from the general estate, interest was payable from the time of death.

In the manner by which the fund was to be computed, and in its uncertainty for years, the facts at bar are parallel.

In that case Judge Rapallo says of the grandchildren to whom the income was payable for life: "As to the sum necessary to make up the deficiency, the grandchildren cannot be said to have received the income of that during their lives, if interest thereon does not commence until the precise amount is ascertained by a sale, which, in the present case, was postponed for upwards of eight years. In some cases where the amount of the fund cannot be ascertained till a period after the testator's death, but the bequest is of the interest on such fund during the life of the legatee, it has been held that to carry out the intention of the testator the legatee for life must be allowed interest on the fund as afterwards ascertained, to be computed from the death of the testator. (Citing cases.) This rule is especially equitable when the fund has all the time been yielding income in the hands of the executors. See *Hilyard's Estate*, 5 Watts & Serg. 30."

The rule, with all its variations, is fully treated by Judge Thomas in his *Estates Created by Will* (vol. 2, p. 1518 et seq.).

The trust fund should be computed upon the net principal of the estate, and the executors should pay to themselves as trustees such part of the income as shall bear to the whole income the same proportion as the trust fund bears to the entire net principal, and the income which is received by the trustees should be paid to the beneficiary.

The payment by the executors of a part of the costs awarded by the judgment in *Bainbridge v. Harris* is disallowed. The only meaning of the judgment is that all the costs awarded were to be paid out of the partnership assets which were left in the

hands of the surviving partners, after deducting therefrom the sums payable to the decedent's estate.

The specific language excludes the suggestion that the costs were in any part payable by the estate, or were payable in such manner as to become a charge upon the estate.

Payable out of the partnership assets, these costs were to be borne by those who had the legal ownership of the partnership assets. There was no owner of them except the plaintiff's surviving partners. The representatives of the decedent's estate had no legal relation to these assets. They had but the right to an account from the surviving partners and to a payment of such sums as should appear due to the estate upon such account.

The expenses of litigating that account might have been imposed upon the estate in part, but this was not done. Moreover, the judgment provided for the full payment to the executors of \$31,000. Had the decretal purpose been to make the estate pay any part of the costs, a sane and ordinary form of judgment would have provided for the payment of the sum named, less the designated portion of the costs.

The judgment is best understood in the light of the provision that if the \$31,000 be not paid the partnership real estate shall be sold and its proceeds devoted to paying, not only the \$31,000, but the costs awarded by the judgment.

A judgment which imposed the costs wholly upon the surviving partners in the case of a sale must have intended the same imposition if the sale did not become necessary.

Let decree be presented accordingly.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of **PLINY T. SEXTON**, as Executor and Trustee Under the Will of **GULY A. ANDERSON**, Deceased.

(Surrogate's Court, Wayne County, December, 1906.)

EXECUTORS AND ADMINISTRATORS—RIGHTS AND LIABILITIES BETWEEN REPRESENTATIVE AND ESTATE—INTEREST ON FUNDS OR PROPERTY—SUMS DEPOSITED IN BANK.

Where it appears that funds of an estate deposited by an executor and testamentary trustee in a national bank of which he was chief owner had not brought any revenue to the bank nor produced any revenue to the executor and that there never was a time when the funds were not on hand for payment to those entitled thereto under the will, the executor and trustee will not be charged with interest upon the funds.

Proceeding for the judicial settlement of the accounts of an executor and testamentary trustee.

Pliny T. Sexton, executor and trustee in person; Stephen Douglas Anderson, in person; E. A. Nash, for contestant.

KNAPP, S.—On the 10th day of April, 1906, letters testamentary under the will of Guly A. Anderson were issued to Pliny T. Sexton. It is not disputed that the contestant in this proceeding filed objections to the probate of the will of Guly A. Anderson, his mother, and after a contest the will was admitted to probate by the surrogate of Wayne county, and letters testamentary were issued to the executor named in said will.

The principal part of the estate that came into the hands of the executor was a bond, dated January 1, 1876, for \$10,000. It is not disputed that, on April 11, 1907, this executor paid such bond, together with the sum of \$838.33, the accrued interest. He deposited such funds to his credit as executor in the First National Bank of Palmyra, N. Y. Thereafter, and on the 8th

day of October, 1908, a petition was filed by this contestant, asking that such executor and trustee might be cited and required to settle his account as such executor and trustee of said estate. Upon the return of the citation, issued upon said petition, and on the 26th day of October, 1908, the executor and trustee did file in the surrogate's office of Wayne county his account as such executor and trustee, in which he charges himself with the sum of \$13,648.82, and credits himself with the sum of \$13,224.91. He also proved upon his accounting a claim of his against the decedent, amounting to the sum of \$144.54, leaving in his hands unadministered the sum of \$279.37.

Stephen Douglas Anderson, one of the heirs at law and legatees under the will of Guly A. Anderson, his mother, filed objections to such account. A hearing was had upon the issues raised by the account and the objections filed thereto, before the surrogate of Wayne county. Upon that hearing, only one of the objections filed was seriously contended for, and that was, whether or not this executor and trustee was liable for the payment of interest upon the share or legacy to which this contestant is entitled, from the 11th day of April, 1907, to the time of this accounting.

It appeared uncontradicted upon the trial that the capital stock of the First National Bank of Palmyra was \$100,000, all of which stock was owned by this executor, except the sum of \$4,000, held by four other stockholders, who each held \$1,000 in stock of said bank. It also appears uncontradicted that, for five years prior to such accounting and such trial, the First National Bank of Palmyra had paid in dividends six per cent. upon its capital stock, and that this executor had received his dividends upon his stock.

The executor in his testimony testified that the First National Bank of Palmyra did not pay interest upon deposits; that it had not for a great many years; that this sum of \$10,000 and accumulated interest had not brought any revenue to the bank,

neither had it produced any revenue to the executor; that from the 11th day of April, 1907, to the present time there was never a time when this money was not on hand for payment to those entitled thereto under the will of Guly A. Anderson. He further testified that, shortly after the 8th day of April, 1907, he had a conversation with this contestant in which he told him that the money to which he was entitled was on deposit in the bank, and that it would not draw any interest while there, and that it could be paid out at any time. It appears by the testimony of the contestant and also of the executor that negotiations back and forth have taken place between the two between the 8th day of April, 1907, and the time of the filing of this contestant's petition for the compulsory accounting of this executor; that for one reason or another they have been unable to agree upon the terms of settlement.

The executor testifies that he repeatedly has told the contestant that he would make advances upon the sum to which he was entitled; that the moneys were in the bank, ready to be paid out, and that no interest would be paid thereon.

I have no doubt that the version given by the executor of the transaction is the correct one. I am not aware that any hard and fast rule can be laid down as to when an executor or administrator shall be charged with interest, as each individual case must be decided upon the facts as presented. In the case of *Jacot v. Emmett*, 11 Paige, 142, the chancellor laid down the rule as follows: "But the mere neglect of an executor or administrator to invest money belonging to the estate, which money he may be called upon to pay to the legatees or distributees at any moment, is no ground for charging him with interest, where such money is kept ready in bank, or otherwise, to be paid over when called for. * * * Indeed an administrator would not be authorized to loan a fund to which adult distributees were immediately entitled at their risk and without authority from them."

This principle has been repeatedly held in the highest courts

of this State, and the authority which I have cited has been quoted therein with approval.

Neither do I think that, simply because an executor is the owner of stock in a bank, he should be forbidden from the keeping of his trust funds therein, and that if he does, he must pay interest thereon. This matter was quite thoroughly discussed and decided in the Matter of Johnson, 57 App. Div. 494; and on page 501 of the opinion, in which case this same executor was a party, Mr. Justice Spring, in writing the opinion, well said: "The bare fact that Mr. Sexton was both executor and chief owner of the bank cannot fairly be made the pretext for punishing him where no wrong has been done."

There is no charge here that Mr. Sexton has either mismanaged this estate, or has been guilty of fraud or collusion; nor that he has used the funds belonging to this estate for his own private or personal use; nor has mixed them with his own funds, so that he was a gainer thereby, except as the claim is made that he has received dividends from the bank in which he is the largest stockholder, and in which these funds were kept.

From the evidence in this case, it has been established to my satisfaction that Mr. Sexton received no interest upon this fund from the 11th day of April, 1907, down to the time of the filing of the petition in this proceeding for his accounting. There had been, from time to time, between the 8th day of April, 1907, and the time of the filing of this petition, repeated negotiations between Mr. Sexton and this contestant concerning a settlement of this account out of court and the share to which he might be entitled. These negotiations took place from time to time with the full knowledge on the part of the contestant that his share of this estate was deposited in the First National Bank of Palmyra, N. Y., subject to payment at any time, and that the same was not drawing interest.

Mr. Sexton, so far as I have been able to find, has exercised good faith in the administration of this estate, and I am unable

to see upon what just theory he should be chargeable with interest upon this fund.

The objections filed to the account of the executor and trustee by the contestant herein are disallowed. The account, as filed, may be settled, and a decree made and entered settling such account on any Monday at 10 a. m. at the surrogate's office in Lyons, N. Y., upon giving five days' notice to the counsel for the contestant herein.

Decreed accordingly.

Matter of the Appraisal Under the Acts in Relation to Taxable Transfers of Property of the Estate of MARIA B. CHAPMAN, Deceased.

(Surrogate's Court, King County, December, 1908.)

TAXES—INHERITANCE AND TRANSFER TAXES—PROPERTY AND INTEREST SUBJECT TO TAX—IN GENERAL—ESTATE BY APPOINTMENT BY WILL PURSUANT TO WILL OF REMOTER ANCESTOR.

Where a daughter by her father's will had the benefit of a trust fund thereby created during life and the power to appoint the persons to receive it at her death, and his will further provided that, if she should fail to make such appointment, the fund should go to her issue; and where the daughter by her will appointed the same persons to receive the fund to whom it was given by the will of her father, she effected nothing by such appointment, since the appointees already had a vested remainder under her father's will; and their interests are not liable to taxation as if transferred to them by the will of the daughter.

Affirmed 133 App. Div. 337.

Appeal from the decision of a transfer tax appraiser.

Kelly & Hoeninghaus (James Allison Kelly and Fritz W. Hoeninghaus, of counsel), for executors; John S. Bennett (M. James McLaughlin, of counsel), for State comptroller.

KETCHAM, S.—The executors appeal from the decision of the transfer tax appraiser, by which a trust fund created by the

will of John Davol for the benefit of his daughter, the decedent in this case, has been taxed, upon a finding that the same passes to the decedent's children by means of an appointment contained in her will.

By the father's will the fund, left in trust to the daughter for life, was at her death to go to such persons as she might lawfully appoint to receive it. But the will further provided as follows:

"If such daughter shall fail to lawfully exercise said power of disposition by her will, or if for any cause a reversion should occur as to the same or any part thereof, they (the trustees) shall pay the same to the lawful issue of such daughter, in the same manner as if such daughter had died intestate owning the same."

Under the mother's will there is an appointment by means of which, if it were allowed to determine the disposition of the fund, the children of the testatrix would receive the same under an absolute legal title.

It thus results that in any event the trust fund reaches the same hands. The question is whether the taxable transfer was effected by the father's will, without the intervention of the appointment.

Under the father's will the children of the testatrix were given a vested remainder. Real Property Law, §§ 30, 31. Their estate, though subject to defeasance by the mother's appointment, was neither divested nor confirmed by the nomination in the mother's will of the same persons to receive the same estate. The appointment did nothing. It changed nothing. It left the fund subject only to the operation of the earlier will. *Matter of Lansing*, 182 N. Y. 238.

The interest of these children is not taxable in this proceeding and the ruling of the transfer tax appraiser, so far as it bears upon the question herein considered, is reversed, but in other respects the report is confirmed.

Decreed accordingly.

Matter of the Estate of MARGARET ENOS, Deceased.

(Surrogate's Court, Montgomery County, December, 1908.)

**EXECUTORS AND ADMINISTRATORS—DEBTS AND LIABILITIES OF THE ESTATE:
ENFORCEMENT OF CLAIMS—EVIDENCE—CLAIMS BY RELATIVES AND PER-
SONS IN CONFIDENTIAL RELATIONS; NURSING AND BURIAL SERVICES;
BOARD AND LODGING: PAYMENT AND SATISFACTION OF DEBTS AND DE-
LIVERY OF PROPERTY OWNED BY OTHERS—PAYMENT BY LEGACY.**

Where a niece without any legal obligation on her part to do so received her aunt into her home and, in addition to providing her with a home and boarding her, rendered laborious services which during the last two years of the aunt's life occupied most of the niece's time and attention day and night, an agreement to pay a reasonable compensation therefor will be presumed.

A legacy in the aunt's will made before such services were rendered will not be deemed a satisfaction of the debt subsequently contracted for those services.

Appeal from an order of the surrogate, granted July 27, 1907, confirming the report of the appraiser and assessing the transfer tax in the above estate under section 232 of the laws relating to taxable transfers of property.

Wendell & Sponable, for executrix and appellant; George C. Stewart, for State comptroller.

MYERS, S.—The decedent died January 27, 1907, at the age of eighty-four years, leaving her surviving Augusta Fisher, this appellant, her niece, and also leaving one nephew, her only heirs at law and next of kin. She left personal property, the net value of which was found by the appraiser to be \$2,731.27, and upon this amount tax was assessed by the order appealed from.

On the 1st day of January, 1903, decedent then being sickly came to reside with the appellant, whether of her own accord or by invitation the evidence taken by the appraiser does not show,

and continued to reside in the home of appellant and was boarded, nursed and cared for by her until her death. On the 10th day of September, 1904, decedent made her last will and testament, in which she first directed that all her just debts and funeral expenses be paid, and thereafter devised and bequeathed all of her property unto Augusta Fisher, the appellant herein, and to her heirs and assigns forever, and appointed the said Augusta Fisher to be executrix.

The evidence taken by the appraiser shows that at no time was any agreement entered into between decedent and appellant whereby decedent was to pay any certain sum for her care and maintenance, or any stated amount per week for care and maintenance. For the services, board, etc., the appellant made claim as a creditor of the estate on the hearing before the appraiser for \$1,486, which amount was not allowed and deducted by the appraiser as a debt in fixing the value of the estate subject to taxation. There is no dispute that claimant furnished board and lodging and rendered all the services for which she claims compensation as creditor, nor is there any dispute that the amount claimed is reasonable. The only question now to be determined is whether appellant is entitled to have such claim allowed and deducted as a debt against the estate, for the purpose of arriving at the value of the estate subject to taxation.

The rendition and acceptance of services beneficent in their nature imply a promise to pay what such services are reasonably worth. This is the general rule laid down. Such presumption, however, is overcome in certain cases from the relationship of the parties and the circumstances surrounding the transactions. The claimant in this case, without any legal obligation on her part to do so, received the decedent into her home, and, in addition to providing her with a home and boarding her, rendered laborious services, which during the last two years of her life occupied most of appellant's time and attention day and night. Had this appellant been without a home and gone to the home of

decedent and rendered such services there, receiving in return a home and support and maintenance, I think, without a promise on the part of decedent to pay for such services, that a presumption would arise that the services were gratuitous. In this case, there was not, in my opinion, a sufficient reciprocity in the benefits enjoyed by the parties, nor a sufficiently close relationship existing between them to rebut the presumption of an agreement to pay a reasonable value for such board, lodging and care.

The will contained an express direction for the payment of debts. A large portion of the support and services for which claim is made was rendered after the making of the will, and I believe that the doctrine that a legacy is never deemed a satisfaction of a debt contracted after the making of a will applies in this case to such services. Decedent having made claimant her sole legatee, it is true she could maintain no action for the value of her services, electing to accept the bequest. Had she, on the contrary, failed to make a provision for claimant by her will, I am clearly of the opinion, from the wording of the instrument and all the circumstances, that she could have recovered from the estate the value of the services rendered, and for the purpose of taxation the claim should be allowed as a valid debt.

Let the order appealed from be modified to the extent of making the cash value of the estate to be taxed \$1,245.27, instead of \$2,731.27.

Decree modified.

Matter of the Estate of EMMA C. SANDS, Deceased.

(Surrogate's Court, New York County, January, 1909.)

**ANOTHER ACTION PENDING—PENDENCY OF ACTION IN ANOTHER JURISDICTION.
FORMER ADJUDICATION—ADJUDICATIONS OPERATIVE AS BAR OR AS CONCLUSIVE
EVIDENCE—IN GENERAL—COURT RENDERING JUDGMENT—INFERIOR
COURTS—FOREIGN PROBATE COURT.**

**WILLS—ESTABLISHMENT AND ANNULMENT—PROBATE—PROCEDURE—EVI-
DENCE—DECREE OF FOREIGN PROBATE COURT.**

In a proceeding for the probate of a will in a Surrogate's Court of this State a judgment of a Probate Court in a foreign State admitting to probate an alleged subsequently executed will of the decedent, such Probate Court being an inferior court of limited jurisdiction and not capable under the laws of such State of becoming a final or conclusive adjudication, until the expiration of the period allowed by the laws of that State for the commencement of an action or proceeding in a Circuit Court to determine the validity of the will, and then only in the event that no such action or proceeding has been commenced within the prescribed period, is not admissible in evidence where such action has been brought in the Circuit Court under the laws of such foreign State.

In such a case the pendency of an action in the Circuit Court of a county in a foreign State brought by the proponent in the present proceeding and certain other parties thereto, within the time allowed by the statutes of that State for the purpose, to test the validity of the said will admitted to probate in that State, is not available as a bar to the prosecution or maintenance of the present proceeding where all the parties to said proceeding are not parties to said action and the issues raised in the action are not entirely the same as and do not cover or necessarily involve all the issues presented in the present proceeding.

Proceeding upon the probate of a will.

John B. Pine, for petitioner; Charles W. Ridgeway, for contestant; Warren S. Bartlett, special guardian.

BECKETT, S.—It is admitted that most of the property of decedent, which consisted entirely of personalty, was situated

in this State at the time of her death, and the evidence establishes that at that time she was a resident of this county and that the papers propounded as her will and codicil thereto were in all respects duly executed in conformity with the law of this State and are entitled to be admitted to probate as her last will and testament unless the proceedings which were had in the courts of the State of Missouri prevent that result. The judgment of the Probate Court of Independence county, in the State of Missouri, admitting to probate an alleged subsequently executed will of the decedent, which the contestant sought to introduce in evidence to defeat the probate of the papers propounded in this proceeding, was made in what is known as a probate proceeding in common form, and from the nature of that proceeding no notice thereof was required to be given to the heirs at law or next of kin of the decedent or to any person in any way interested in sustaining the validity of the papers here offered for probate; and it does not appear that notice of the proceeding was given to or actually had by any of them or by any party to this proceeding, although it might not unreasonably be surmised that that proceeding was not unknown to such of them as were interested in establishing the will affected by it and in preventing the probate of the papers here propounded. After the termination of the proceeding in the Independence county Probate Court an action was brought in the Circuit Court of Jackson county, in the State of Missouri, by the proponent in this proceeding and certain other of the parties thereto, within the time allowed by the statutes of that State for the purpose, to test the validity of the will so admitted to probate in that State. That action or proceeding is still pending, but all of the parties to this proceeding are not parties thereto. No attempt was made by the contestant in the present proceeding to prove the last mentioned will in accordance with the requirements of the provisions of our Code relating to the probate of wills by Surrogates' Courts, he entirely resting his

case upon the contention that the proceedings in the State of Missouri were a complete bar and answer to the present proceeding. Under the laws of the State of Missouri the judgment or action of the Missouri Probate Court was not capable of becoming a final or conclusive adjudication until the expiration of the period allowed by those laws for the commencement of an action or proceeding in the Circuit Court to determine the validity of the will, and then only in the event that no such action or proceeding had been commenced within the prescribed period. Such action or proceeding was brought and, as previously stated, is now pending. The judgment or action of the Probate Court, which is an inferior court of limited jurisdiction, was entirely interlocutory and inconclusive in character, and of no binding force whatever at the time of the commencement of the action in the Circuit Court, and the commencement of that action immediately effected a vacation of the action of the Probate Court and left the question of the validity of the will entirely open for trial and decision by the Circuit Court precisely and as completely as if the action in the Probate Court had never been taken. *Hogan v. Hinckley*, 195 Mo. 532; *Cust v. Lust*, 142 id. 630, 637. The judgment or action of the Missouri Probate Court not being a conclusive adjudication in the State of Missouri, obviously it cannot operate as such an adjudication in this State. But whatever may be the force of that judgment in the State of Missouri, it could not and does not preclude or estop the proponent and the other parties to this proceeding who were not parties to the action or proceedings in which it was obtained from entirely ignoring such action or proceedings and proving despite them that the instruments under which they claim were the last will and testament of the decedent. *Matter of Law*, 56 App. Div. 458; *Matter of Gaines*, 84 Hun, 520, 523; *affd.* 154 N. Y. 747; *Garvey v. United States Fidelity & Guaranty Co.*, 77 Hun, 395; *Overby v. Gordon*, 177 U. S. 214, 227; *Tilt v. Kelsey*, 207 id. 43, 51, 59;

Bridgman v. Fayerweather, 140 Mass. 415, 416; Bowen v. Johnson, 73 Am. Dec. 51. It follows that the record of the proceedings in the Probate Court of Independence county cannot be admitted in evidence in this proceeding. All the parties to the present proceeding are not parties to the action in the Circuit Court of Jackson county, and the issues raised in that action are not entirely the same as and do not cover or necessarily involve all the issues presented in this proceeding, and the judgment which might be rendered in the Circuit Court need not necessarily or at all affect the relief the proponent seeks here. Such being the case, the pendency of the proceeding in the Circuit Court is unavailable as a bar to the prosecution or maintenance of this proceeding. Stowell v. Chamberlain, 60 N. Y. 272, 276; Mandeville v. Avery, 124 id. 376, 387; Clark v. Vilas Nat. Bank, 22 App. Div. 607. Having concluded that the proceeding in the State of Missouri presents no obstacle to the probate of the papers propounded, I shall, as previously intimated, admit them to probate as constituting the last will and testament of the decedent.

Decreed accordingly.

Matter of the Estate of ADOLPHUS PRICE, Deceased.

(Surrogate's Court, New York County, January, 1909.)

TAXES—INHERITANCE AND TRANSFER TAXES—PROPERTY AND INTEREST SUBJECT TO TAX—TRANSFERS BEFORE DEATH—TRANSFERS IN CONTEMPLATION OF DEATH.

Gifts or grants made in contemplation of the death of the donor or grantor and taxable under the laws relating to taxable transfers are not limited to gifts *causa mortis* but extends to gifts *inter vivos* which are made by the donor in contemplation of death.

Where a man seventy-six years of age, who for two years before his death had suffered from disease and been under medical treatment for it and had been in a hospital or sanitarium under the care of specialists, less than three weeks after he left the hospital and about ten days before his death, while ill and confined to the house, sent for his attorney and, after telling him that "he didn't know when his ailment would take a turn for the worse" and explaining to him that he desired to make such a disposition of his property as would save his son the annoyance of a will contest, executed deeds by which he conveyed all his real estate to his adopted son, such conveyance should be held to have been made in contemplation of death.

Appeal by an executor from an order fixing tax.

Hoadly, Lauterbach & Johnson, for petitioner; John S. Jenkins, for State Comptroller.

BECKETT, S.—This is an appeal by the executor from an order fixing tax upon the ground that certain real estate appraised at \$261,000 was included in the taxable assets of the estate. This real estate was transferred by the decedent to his adopted son, Richard Price, about ten days before his death, and the appraiser found that the transfer was made by the grantor in contemplation of his death and, therefore, taxable. The executor contends that the transfer constituted a gift *inter vivos*, and that it was not made in contemplation of death.

Adolphus Price was seventy-six years of age when he died. For about two years before his death he had suffered from catarrh or inflammation of the bowels, and had been under medical treatment for that disease during that time. At the request of a specialist in disease of the stomach and bowels he went to a sanitarium in New York city on January 17, and remained there until January 24, 1907. On the thirtieth of the same month he became an inmate of the German Hospital, in the city of New York, and remained there until February sixth under the care and supervision of another specialist in stomach and bowel diseases.

On February twenty-fifth he sent for his attorney, and after telling him that "he didn't know when his ailment would take a turn for the worse," and explaining to him that he desired to make such a disposition of his property as would save his son the annoyance of a will contest, he executed the deeds by which he conveyed all his real estate to said adopted son. He was ill and confined to the house at that time. He died on March 7, 1907, ten days after the execution and delivery of the deeds. The foregoing facts appear in the affidavits submitted to the appraiser by the executor.

The decisions of the courts of this State upon the subject of gifts made in contemplation of death are not entirely uniform. In *Matter of Spaulding*, 49 App. Div. 546, and *Matter of Marlstedt*, 67 id. 176, there is a tendency to follow the *dictum* of the Court of Appeals in *Matter of Seaman*, 147 N. Y. 76, to the effect that the meaning of the phrase "gifts made in contemplation of death" is to be limited so as to only apply to that class of cases where the circumstances surrounding the giving or granting would bring such a transfer under the definition of a gift *causa mortis*. But such a restricted signification of the scope of the Transfer Tax Statutes of 1887 and 1892 is scarcely in accordance with the deductions which may be drawn from the application of well recognized rules of statutory construc-

tion. By chapter 715 of the Laws of 1887 "transfers made or intended to take effect in possession or enjoyment after the death of the grantor" were taxable. Such transfers possessed the distinguishing characteristics of gifts *causa mortis*, namely, taking effect only at or after the death of the donor. In 1892 the Transfer Tax Law was amended by the insertion of an additional clause in that part of the statute taxing transfers by gift or grant, namely, "gifts or grants made *in contemplation of the death* of the donor or grantor." As the statute of 1887 applied to gifts *causa mortis*, the amendment of 1892 extending the operation of the act to gifts made in contemplation of death would seem to indicate an intent on the part of the Legislature to tax those gifts *inter vivos* which were made by the grantor in contemplation of death, and which would escape taxation under the language of the statute of 1887. It would, therefore, appear that in determining whether the gift was made in contemplation of death the courts should not be restricted to those cases where the circumstances (such as that the gift was made when the donor was *in extremis*, or was dangerously ill, or in danger of immediate death, or afflicted with an acute disease) would indicate the existence of those conditions necessarily requisite to the validity of a gift *causa mortis*, but rather that the facts and circumstances surrounding the making of the gift be taken into consideration and a determination arrived at as to whether such facts and circumstances indicate that the gift was made while the donor contemplated the probability of his own death in the immediate future, or whether or not the imminence of the donor's death was in any substantial sense a direct cause of such gift. *Matter of Palmer*, 117 App. Div. 160; *Rosenthal v. People*, 211 Ill. 309. In the matter under consideration the deeds to the real estate were executed by the decedent, delivered to the grantee and duly recorded by him. It was, therefore, an absolute transfer of the real estate, and the only question to be determined is whether it was made in

contemplation of the death of the grantor. To prove that property is transferred in contemplation of death is exceedingly difficult, as the only parties whose intimacy with a decedent would afford them an opportunity of being cognizant of his intentions are usually those whose interests would be served by testimony to the effect that the gift was not made in contemplation of death, and the State is, therefore, compelled to rely upon conclusions derived from the testimony of witnesses who are interested in disproving its contention. It is also in large measure the attempted proof of the operation of a man's mind. The only witnesses before the appraiser in the present proceeding were the grantee of the property and the attorney for the executor. The grantee is also the executor of the estate and the residuary legatee under the will, and his attorney was the legal adviser of the decedent. From the attorney's affidavit it appears that the ostensible motive which prompted the decedent to transfer the property to the grantee was the desire to save the latter from the possible annoyance and trouble which the decedent contemplated might ensue when his will was presented for probate. There is no evidence that there was any pecuniary consideration for the conveyance, and the failure of the executor to adduce such testimony may be taken as conclusive proof that there was no such consideration. The donee, if he had not acquired the land by the deeds, would have received it as a devisee. The will was executed in 1899, about eight years before his death, and the fact that the decedent only ten days before his death desired to make such a disposition of his property as would effectually prevent its passing to any of his relatives except his adopted son would indicate that the decedent at that time had such an apprehension of approaching dissolution that he must have contemplated the probability of his own demise within a very short time thereafter. He had been suffering from a chronic disease for over two years, and the fact that a few weeks before his death it was necessary for him to

consult two specialists in that disease and remain about three weeks in a hospital and sanitarium under the care and supervision of the specialists would seem to indicate that the disease had progressed to such an extent that it was rapidly approaching the critical or acute stage, and that it had rendered him weak, feeble and debilitated. It appears from the testimony that decedent himself at the time he executed the deeds was conscious of the fact that the disease might at any time "take a turn for the worse," and that such a change would probably be followed in a short time by his death. As a matter of fact it did take such a turn eight days after he used that expression, and he died ten days thereafter.

Therefore, all the facts and circumstances connected with the execution of the deeds and the transfer of the real estate lead to the conclusion that the gift was made in contemplation of death. *Matter of Birdsall*, 22 Misc. Rep. 180; *affd.* 43 App. Div. 624. The appeal should be dismissed.

Appeal dismissed.

Matter of the Estate of SIGOURNEY W. FAY, Deceased.

(Surrogate's Court, New York County, January, 1909.)

TAXES—INHERITANCE AND TRANSFER TAXES—EXEMPTIONS—CEMETERY ASSOCIATION.

A bequest to a foreign cemetery association, the interest upon which should keep the testator's lot in good condition forever, is taxable under the laws relating to taxable transfers.

See 135 App. Div. 45.

Appeal from an order assessing a tax upon a bequest.

James H. Fay, for petitioner; John S. Jenkins, for State Comptroller.

BECKETT S.—This is an appeal by the executor from an order which assessed a tax of \$50 upon a bequest to the Mt. Auburn Cemetery Association. The decedent directed his executor to pay to the Mt. Auburn Cemetery Association the sum of \$1,000, “so that the interest of this sum will keep my lot in good condition forever.” The cemetery association is a Massachusetts corporation. The executor contends that the bequest is to be considered as part of the funeral expenses and, therefore, not taxable. In *Matter of Vinot*, 7 N. Y. Supp. 517, Surrogate Ransom held that a bequest of \$1,000 to an association the income of which was to be applied to the care and preservation of the burial plot of decedent was not taxable. As this decision has not been overruled by a higher court, it might be considered as a controlling authority in this case. In view, however, of the language of the Court of Appeals in the *Gould* case, 156 N. Y. 423, and of the Appellate Division in the *McAvoy* case, 112 App. Div. 377, it would appear that the decision in the *Matter of Vinot* would scarcely meet with the approval of the appellate courts at the present time. In the *Gould* case it was held that the property was taxable, although bequeathed for the purpose of satisfying a contractual obligation existing at the time of decedent's death; and in the *McAvoy* case it was held that the bequest was taxable, although the beneficiary received it in payment of services to be rendered thereafter. While it has been held that a sum spent by an executor in the erection of a monument to decedent is exempt (*Matter of Edgerton*, 35 App. Div. 125), and that a reasonable sum spent in the purchase of a burial plot for decedent may be regarded as a part of the funeral expenses and, therefore, a proper deduction (*Matter of Liss*, 39 Misc. Rep. 123), there is a manifest distinction between such expenditures made by an executor in his discretion and a bequest made by decedent in his last will to a certain beneficiary and for a certain specific purpose. In the latter case the property passes to the beneficiary by virtue of

the provisions in decedent's will, and as the statute provides that all property passing by will (if not going to parties specifically mentioned as being exempt) is taxable, the bequest to the Mt. Auburn Cemetery Association would seem to be taxable.

Decreed accordingly.

Matter of the Estate of SOPHIE BEAVER, Deceased.

(Surrogate's Court, New York County, January, 1909.)

CHARITIES: STATUTORY RESTRICTIONS AS TO GIFTS—RESTRICTION AS TO PROPORTION OF DONOR'S ESTATE; INTERPRETATION AND CONSTRUCTION—APPLICATION OF CY PRES DOCTRINE.

WILLS—VALIDITY, OPERATION AND LEGAL EFFECT—IN GENERAL—CY PRES DOCTRINE.

A bequest to one who is the treasurer of a hospital in trust to be used as she may deem best towards the interest of the hospital is valid under the provisions of chapter 701 of the Laws of 1893 as amended by chapter 291 of the Laws of 1901.

Nor does such bequest contravene the provisions of section 6 of chapter 319 of the Laws of 1848 as amended by chapter 623 of the Laws of 1903 because the will was executed within two months preceding the death of the testatrix.

Proceeding upon the probate of a will.

Max Alter, for executor; Bayard L. Peck, for Anna McEvoy; Chiland, Shoemaker & Hedges, for legatee.

BECKETT, S.—The testatrix by a codicil to her will made the following bequest: "2. I give and bequeath to Sister Louise Gonzaga, of St. Vincent's Hospital of the City of New York, State of New York, \$1,600, sixteen hundred dollars, in trust, to be used as she may deem best *towards the interest* of St. Vincent's Hospital in the City of New York."

The legatee was the treasurer of St. Vincent's Hospital, which is a corporation organized under chapter 319 of the Laws of 1848. It is claimed that the bequest is void because the will was executed within two months preceding the death of the testatrix in contravention of section 6 of the act mentioned, as amended by chapter 623 of the Laws of 1903. The administratrix of the legatee named claims this bequest as an outright gift. The bequest is evidently not a precatory one and cannot be regarded as a bequest to the legatee, divested of any trust obligation. Nor is it to be regarded as a dry or naked trust, so as to vest the title immediately or directly in the corporation. It is a trust which vests the legal title in the legatee and imposes upon her active trust powers and duties, involving discretion, which are to be exercised for the use and benefit of the beneficiary, but in the manner prescribed by the testatrix. Such a trust would have been void at the time of the enactment of chapter 701 of the Laws of 1893, but I am satisfied that that act, as amended by chapter 291 of the Laws of 1901, validates the bequest and enables all corporate as well as voluntary bodies or organizations answering to the description of those mentioned in the act to be or become beneficiaries of a trust for the uses or purposes therein specified. *Robb v. Washington & Jefferson College*, 185 N. Y. 487, 495; *Matter of Griffin*, 167 id. 71. See *Matter of Cooney*, 112 App. Div. 661, 662; *affd. without opinion*, 187 N. Y. 546; *Matter of Shattuck*, 118 App. Div. 888.

St. Vincent's Hospital being the beneficiary of such a trust and not acquiring its interest in the subject thereof as a direct or absolute gift or bequest, section 6 of chapter 319 of the Laws of 1848, as amended by section 1 of chapter 623 of the Laws of 1903, above referred to, has no application to the legacy, as those sections relate exclusively to a bequest or devise made directly to and not in trust for the legatee or devisee. *Allen v. Stevens*, 161 N. Y. 148, 149. The death of the trus-

tee, which has occurred since this matter was argued, will not affect the execution of the trust, as it will descend to and devolve upon the Supreme Court. Laws of 1893, chap. 701, as amd. by Laws of 1901, chap. 291.

There is no evidence of the identity or the existence at the time of the death of the testatrix of the person named Sophie Engelks, to whom is bequeathed by paragraph third of the will a share in what was therein called the "Doran mortgage." Unless such evidence is presented her share will be directed by the decree to be paid into the treasury of the State as provided by section 2747, Code of Civil Procedure. The designation of the aforesaid mortgage as the "Doran mortgage," which was not found among the assets of the testatrix, creates a latent ambiguity, and I decide that the "Donovan mortgage," which was in the possession of the testatrix at the time of her death, was the one intended to be described by the testatrix.

There is an insufficiency of assets with which to pay debts and expenses of administration, together with the legacies given by the will, and said legacies must abate *pro rata*. Redf. Surr. (6th ed.), § 760. Tax costs and settle decree on notice.

Decreed accordingly.

NOTE ON CY PRES DOCTRINE.

DEFINITIONS.

Literally, "as near to." Imperial Dictionary. *Allen v. Stevens*, 33 App. Div. 485.

A rule in equity to the effect that when a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, the duty may be performed with as close an approximation to the scheme as laid out, as is reasonably practicable. *Philadelphia v. Girard*, 45 Pa. St. 9.

The doctrine of *cy pres*, which in substance is, if you cannot find the society specified in the will, or apply the fund to the charity intended by the testator, the court will then apply it to some other charity as nearly analogous to it as possible. *Carter v. Balfour*, 19 Ala. 814.

It seems to be this, that if it can be seen that a charity was intended by the testator, but the object specified cannot be accomplished, the funds may be applied to other charitable purposes, or that the chancellor may seize them as a sort of waif, and apply them as his, or the king's good conscience shall direct. * * * In this way the chancellor substitutes himself in the donor's place, and really makes the will himself. 2 Story on Equity, 424, cited in *White v. Fisk*, 22 Conn. 30.

The right of making an approximate or discretionary will for a testator where he has only declared some indefinite illegal or ineffectual charitable purpose. *Beekman v. Bonsor*, 23 N. Y. 298.

The rule has been adopted in cases where the testator clearly intended to give estates which were contrary to law. *Jackson v. Brown*, 13 Wend. 437.

Where a literal compliance with the condition becomes impossible from unavoidable circumstances and without any default of the party, it is sufficient that it is complied with as nearly as it practically can be, or as it is technically called, *cy-pres*. L. R. 18 Ch. D. 61.

AS APPLIED TO CHARITIES—GENERALLY.

Held to be a judicial principle of construction and not of administration. *Hayden v. Connecticut Hospital*, 64 Conn. 320.

Relates only to charitable gifts, and also to such gifts as are valid. *Mason v. Perry*, 22 R. I. 476.

Must be a real necessity for finding another similar or like object, which is not to be determined by the advantage to the beneficiaries, but solely by the fact that a strict adherence to the original plan will destroy or impair the donor's general purpose. *Atty.-Gen. v. Whitely*, 11 Ves. Jr. 241.

SAME—DISCRETION OF TRUSTEE AND POWER OF COURT.

Broad distinction between gift direct to charity, and gift to trustee for charitable purposes designated; in first case, act of court in designating charity under *cy-pres* doctrine is a ministerial act only; in second, the court has power to guard against a breach of trust, incapacity, or application to purposes foreign to the charity. *Reformed Protestant Dutch Church v. Bradford*, 8 Cow. 457.

In case of a breach of trust, the trustee should be directed to specifically perform the trust, or pay the fund into court, but not to return the fund to the donor. *Associate Alumni v. General Theological Seminary*, 163 N. Y. 417.

Court cannot sanction, without consent of governing board of trust, a scheme which ousts the board from its right of administering the same, when it is capable of being carried out, and no breach of trust is demonstrated. *Atty.-Gen. v. Butler*, 123 Mass. 304.

SAME—LIMITATIONS THEREUPON.

Court must be able to satisfy itself that some other object can be found, most nearly consonant, and answering in a reasonable degree, to the donor's general charitable purpose. *Sheldon v. Chappell*, 47 Hun, 59.

Where provision is made for the education of poor children in a certain district by an incorporated academy and its successors, and the academy is abandoned upon the establishment of public schools, the property will be applied to like charitable purpose in a different manner. *Green v. Blackwell*, 35 Atl. 375.

Bequest to charitable corporation does not lapse because such corporation has discontinued part of its charitable work. *Soldiers' Orphans' Home v. Wolff*, 10 Mo. App. 596.

AS APPLIED TO PERPETUITIES.

Where land is devised to an unborn person for life, remainder to his children in tail, or to his sons in tail male, the unborn person is held to take, in the first case, an estate tail, and in the second, an estate tail male, under the doctrine of *cy pres*, since remainders to the issue of an unborn child are too remote, this being an exception to the rule that the construction of an instrument is not to be affected by the existence of the rule against perpetuities. *Pitt v. Jackson*, 2 Bro. Ch. 51.

Suppose land was devised to an unborn person for life, remainder to his children in fee; the unborn person would not be held to take a fee, under the doctrine of *cy pres*; that doctrine is never applied where the enlarged estate given to the unborn person would allow persons to take the property who were not within the scope of the gifts marked out by the testator. *Wood v. Griffin*, 46 N. H. 230.

Matter of the Estate of ADELBERT SPINK, Deceased.

(Surrogate's Court, Oswego County, January, 1909.)

MARRIAGE—EVIDENCE AND QUESTIONS OF LAW AND FACT—SUFFICIENCY OF EVIDENCE.

Relations between a man and woman, meretricious in their inception, may become matrimonial in character without the aid of a ceremonial marriage; and, in such a case, amid conflicting circumstances, continued cohabitation and the birth of a child recognized by the father and treated by him as legitimate during the remainder of his life compel the conclusion that the relation of husband and wife existed between the parties.

Proceeding to revoke letters of administration.

F. G. Whitney and W. B. Baker, for petitioner; A. S. Barker and Udelle Bartlett, for respondent.

MILLER, S.—This proceeding was instituted by Harvey D. Spink, a son of the deceased, to revoke letters of administration issued by the Surrogate's Court of Oswego county, N. Y., to Ellen R. Spink, on or about the 22d day of June, 1908, upon the ground that she was never the legal wife of deceased. The administratrix concedes that she was never married to deceased by any ceremonial marriage, but contends there was a contract of marriage between her and Spink and that their intercourse had been in fulfillment of that contract, and was matrimonial in character.

It appears from the evidence that the first wife of deceased died in 1898, leaving her husband and two children her surviving, one of whom is the petitioner in this proceeding and the other a daughter over twenty-one years of age.

For some little time prior to the death of the first wife of deceased, the said Ellen had been employed from time to time as

a domestic in the family of deceased; and there is evidence to show that the conduct of the deceased and Ellen was highly improper, if not illicit, in its nature. A few months after the death of the first wife, the said Ellen went to the home of deceased and lived and cohabited with him until his death on the 2d day of June, 1908. The family consisted of only deceased and Ellen, until 1903, when a female child was born; and all parties concede the deceased is the father of this child. She is now five years of age and upwards, and has always been known in the neighborhood where her father and mother have resided as Marion Spink.

On the hearing, petitioner swore a large number of witnesses who testified that it was the general repute in the neighborhood where the parties resided that they were not married. Petitioner also proved one or two instances that would indicate that Ellen did not claim to be the wife of the deceased. On the other hand, Ellen produced several witnesses who testified that it was the general repute in the neighborhood where the parties resided that they were husband and wife. As Judge Hatch says, in *Tracy v. Frey*, 95 App. Div. 579, at page 587, the testimony given by the petitioner's witnesses upon this point is somewhat weakened by the fact that nearly if not all testified, upon cross-examination, that they understood that it was essential to a valid marriage that some civil ceremony was necessary, either by a civil magistrate or a clergyman, and that without that ceremony no lawful marriage could exist.

The respondent also shows that, upon several different occasions, commencing in 1899 and continuing down to the death of Spink, he referred to her as his "wife," and introduced her to different persons as his wife. Her mother, Chloe Gay, also testified that, in 1899, the deceased told her that he and Ellen were married and that Ellen was going to his house to stay, and that they were to live together as husband and wife; that, in reply to her inquiry if they had been away to be married,

Spink replied "No;" that it was unnecessary; that they had agreed to live together as man and wife.

If the validity of this marriage was to stand or fall on this woman's testimony, it would certainly fall. A mother of mature age that would consent without protest to such an arrangement for a daughter barely out of her teens is entitled to but little consideration at the hands of this or any other court; and her testimony should be treated accordingly.

The petitioner contended on the trial, and still contends, that all evidence of declarations of decedent and all transactions between him and Ellen subsequent to January 1, 1902, when the provisions of chapter 339 of the Laws of 1901 took effect, were incompetent and inadmissible.

The respondent contends on the trial that the alleged contract of marriage was made in 1899; and to sustain her contention showed acts and statements of the decedent prior to January 1, 1902, when said act took effect, indicating that her relations with him were matrimonial in character. Therefore, I think that acts and declarations of deceased, indicating that relationship subsequent to the act of 1901, were competent and material.

In the case of *Caujolle v. Ferrie*, 23 N. Y. 90, the relation in its inception was meretricious; and, although there was no proof of any ceremonial marriage or other contract of marriage thereafter, yet, as the parties continued to cohabit together and declarations were made on the part of the mother, that a child born of this marriage was legitimate, it was held that a marriage subsequent to the commencement of the illicit intercourse would be presumed, although there was no direct proof establishing such a contract.

Judge Finch lays down practically the same proposition in *Badger v. Badger*, 88 N. Y. 546.

Notwithstanding these cases and subsequent decisions which seem to extend rather than limit this presumption, I should

hesitate to find a contract of marriage in this case, were it not for the fact that the alleged statements, declarations and acts of the deceased were followed by the birth of this little girl; and, when she was about to be born, it appears that the deceased requested a neighbor to go for a physician, stating that his wife was about to be confined; that the child bore his name, always addressed him as "papa" and, as long as her father lived, was treated in every way like a legitimate, natural child. Under such circumstances, the presumption is very strong that the parents were actually married. *Gall v. Gall*, 114 N. Y. 109, 119. Judge Andrews writing upon this point in *Hynes v. McDermott*, 91 N. Y. 451, 459, says: "The presumption of marriage, from a cohabitation, apparently matrimonial, is one of the strongest presumptions known to the law. *This is especially true in a case involving legitimacy.* The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence."

The decisions are to the same effect in *Tracy v. Frey*, 95 App. Div. 579, and *Matter of Matthews*, 153 N. Y. 443.

A fair application of the principles laid down in these decisions as well as those cited by the petitioner in his brief to the facts in this case leads me to decide, somewhat reluctantly, that there was a contract of marriage between the said Adelbert Spink and said Ellen R. Spink; that she is his lawful widow, and is entitled to administer his estate.

It follows that the proceeding to revoke her letters must be dismissed, with costs to respondent payable out of the estate.

The costs may be adjusted on any term day on five days' written notice to petitioner's attorney.

Proceeding dismissed, with costs.

Matter of the Estate of WILLIAM P. PETERSON, Deceased.

(*Surrogate's Court, Cattaraugus County, January, 1909.*)

**EXECUTORS AND ADMINISTRATORS—DEBTS AND LIABILITIES OF THE ESTATE—
DIRECTION TO PAY CLAIMS—DOUBTFUL OR DISPUTED CLAIMS—WHEN
PETITION MUST BE DISMISSED.**

Where, in answer to a petition filed in a Surrogate's Court by one claiming to be a judgment creditor of the decedent and praying for the payment of his claim, the administrator sets up the discharge of the decedent in bankruptcy after the recovery of the petitioner's judgment, the Surrogate's Court is without jurisdiction to try the issue and must dismiss the petition.

Proceeding under section 2722 of the Code of Civil Procedure to compel payment of a demand against the estate.

Henry Donnelly, for petitioning creditor; M. B. Jewell, for administrator.

DAVIE, S.—Decedent died intestate, at the city of Olean, March 19, 1908; and letters of administration upon his estate were issued May 18th of the same year. The petition filed in this proceeding alleges that the claimant is the owner of a judgment regularly obtained and duly docketed in his favor against the decedent during his lifetime and that a claim therefor, duly verified, has been presented to the administrator; that more than six months have elapsed since the appointment of the administrator and that there are sufficient assets in the hands of the administrator to satisfy his demand.

Upon the return day of the citation issued upon such petition, the administrator appeared and filed an answer, duly verified, in which he alleged insufficient funds to meet the petitioner's demand; that the claim was duly presented but absolutely rejected; and also contains the following allegation:

"And the said defendant further answering, denies the petition and each and every allegation therein contained, not hereinbefore specifically admitted, and

"Second: The said defendant, George W. Peterson, in further answering, alleges that, after the recovery of the said judgment by the petitioner against William P. Peterson, a petition was duly presented by the said William P. Peterson to the District Court of the United States for the Western District of New York, praying for a discharge in bankruptcy of all the provable debts of the said William P. Peterson, and that the said William P. Peterson then resided at the city of Olean, Cattaraugus county, N. Y., in the said Western District of New York and within the jurisdiction of said court and district; and that such proceedings were had in said court that, on the 18th day of December — the said District Court of the United States for the Western District of New York duly granted unto the said William P. Peterson a discharge in bankruptcy, discharging all his provable debts, including the claim and judgment set forth in the petition and the claim upon which the said judgment is founded.

"The said defendant, further answering, denies that the said petitioner is or was, at the time when said petition was made and verified, a creditor of the estate of William P. Peterson, deceased, or that he had any valid claim against said estate.

"Wherefore the defendant demands that the petition be dismissed with costs."

Section 2722 of the Code, under which this proceeding is instituted, provides: "On the presentation of such a petition, the surrogate must issue a citation accordingly; and, on the return thereof, he must make such a decree in the premises as justice requires. But in either of the following cases the decree must dismiss the petition without prejudice to an action or an accounting, in behalf of the petitioner:

"1. Where the executor or administrator files a written answer, duly verified, setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal and denying its validity or legality absolutely, or on information and belief."

The only question, then, to be determined is whether or not the answer filed in this proceeding is of such a character as to demand the dismissal of the petition under the provisions of the section above quoted. The allegation of insufficient assets is not a sufficient answer to justify dismissal of the petition; the Surrogate's Court has the right to inquire, upon an application of this nature, into the question of the ability of the estate to meet the demand. *Matter of Sherwood*, 75 App. Div. 342; *Brown v. Phelps*, 48 Hun, 219; *affd.*, 113 N. Y. 658.

Do the other allegations of the answer constitute a denial of the validity or legality of the petitioner's claim and sufficiently set forth facts showing that it is doubtful whether the petitioner claim is valid and legal?

In construing the section of the Code above referred to, the Court of Appeals has held that "the citation brings in the executor, not to plead or respond to the petition, but by a verified written answer to set forth affirmatively facts which show that it is doubtful whether the petitioner's claim is valid and legal and also denying its validity or legality absolutely or upon information and belief: Both conditions must concur." *Lambert v. Craft*, 98 N. Y. 347; *Matter of Macaulay*, 94 id. 574.

The answer filed distinctly denies the validity and legality of the claim and in that respect is in conformity with the principle enunciated in the cases cited. Do the facts set forth in the answer show that the claim is doubtful? Are the facts upon which the assertion of invalidity is predicated of such a character that the Surrogate's Court has no jurisdiction to determine them?

The answer asserts, while not denying the original validity of

the judgment, that such proceedings have been had subsequently to the docketing of the judgment, that it has been discharged and is no longer a demand against the decedent or his estate; that proceedings were instituted in the District Court of the United States by the judgment debtor for a discharge from all his provable debts and obligations; that such court had jurisdiction of the person and of the subject-matter and that a decree of said court was duly rendered discharging the judgment debtor from the obligation in controversy. To try and determine the truthfulness of these allegations would involve an examination of the bankruptcy proceedings, the form and sufficiency of the petition filed therein, the various steps taken by the District Court in that matter, and all the details relating to the making of the final decree therein. It would also involve the question as to whether or not the judgment debtor had complied with the provisions of section 1268 of the Code of Civil Procedure. All these subjects of investigation are not within the jurisdiction of the Surrogate's Court.

In *Matter of Wagner*, 119 N. Y. 28, Judge Gray, in the opinion, says: "I think we should hold it as the true exposition of the law in such cases, where an application is made to the surrogate for an order compelling the executor or administrator to file an inventory, or to render an account, and it appears, in answer to it, that the applicant can have no right to such an order, by reason of his interest having been satisfied and extinguished, by a settlement and distribution, whether in or out of court, or barred by a release or otherwise, and the factum of a settlement or of a release or any act constituting the bar, is put in issue by the reply of the applicant, that the surrogate should dismiss the petition and remit the applicant to his proceeding in a court having general equity powers to try out such issue. That power the surrogate does not possess."

This limitation on the power and jurisdiction of the Surrogate's Court is recognized and applied to proceedings under sec-

tion 2722 of the Code. *Matter of Randall*, 152 N. Y. 508; *Stilwell v. Carpenter*, 59 id. 414; *Bevan v. Cooper*. 72 id. 317.

In *McNulty v. Hurd*, 72 N. Y. 518, Church, C. J., says: "We think that there is a distinction between judgments against the testator or intestate and other claims. A judgment is an adjudication of the rights of the parties in respect to the claim involved; it cannot be disputed in the sense contemplated by the statute. It imports absolute verity. * * * As to the next inquiry above suggested, we are of the opinion that the surrogate may inquire into, and pass upon, payments made to apply upon such judgments, and determine the amount thereof. He may also determine who is the owner of the judgment and entitled to the money. * * * Beyond this the surrogate has no jurisdiction to try and determine questions in respect to the validity of judgments, * * * as if obtained by fraud, or where there has been an accord and satisfaction; and there may be other grounds for relief, such as is a set-off and the like, or the estate of the deceased may be entitled in equity to a release or discharge, either in whole or in part, from the judgment, and as to all these, I can find no warrant in the statute for the exercise of jurisdiction by the surrogate to adjudicate them. To affirm such a power would open the door to a wide field of jurisdiction in law and equity by Surrogate's Courts not contemplated by the statute, inconsistent with the limited powers conferred, and in some cases subversive of the right of trial by jury."

Under these authorities, it is apparent that the answer filed in this proceeding raises issues which the surrogate has no jurisdiction to investigate or determine. Consequently, the petition must be dismissed, without prejudice to the petitioner's right to resort to any legal proceedings for the enforcement of his demand.

A decree will be accordingly entered.

Decreed accordingly.

Matter of the Estate of MIRANDA SCHEETZ, Deceased.

(*Surrogate's Court, Cattaraugus County, January, 1909.*)

EXECUTORS AND ADMINISTRATORS—DEBTS AND LIABILITIES OF THE ESTATE: EXHIBITION, ESTABLISHMENT, ALLOWANCE AND ENFORCEMENT OF CLAIMS—STATUTES OF NON-CLAIM OR SHORT STATUTES OF LIMITATION—SUFFICIENCY OF REFUSAL OR REJECTION OF CLAIM; WAIVER OF SHORT STATUTE: REFERENCE—PRACTICE AND PROCEDURE—OFFER AND AGREEMENT TO REFER.

SURROGATE'S COURTS—NATURE AND EXTENT OF JURISDICTION—ADMINISTRATION OF DECEDENTS' ESTATES—SETTLEMENT OF CLAIMS ON ACCOUNTING BY REPRESENTATIVES—CLAIMS BY AND AGAINST ESTATE IN GENERAL—CLAIMS ADMITTED, ALLOWED ON, OR REJECTED BY REPRESENTATIVE.

While the Surrogate's Court has no power to adjudicate the merits of claims against a decedent's estate, it may determine whether they have been properly presented, allowed or rejected.

Where a claim against a decedent's estate, properly presented to the executor either before or after the commencement of the publication of notice to creditors, is rejected, the claimant, if dissatisfied, must, under section 1822 of the Code of Civil Procedure, commence an action against the executor within six months of the rejection of the claim, unless the written consent of the respective parties that the claim may be heard and determined upon the judicial settlement of the account of the executor is properly filed with the surrogate.

If an executor, while entertaining doubt regarding the validity of a duly presented claim, does not possess sufficient knowledge to justify him in absolutely allowing or rejecting the same, he may, under section 2718 of the Code of Civil Procedure, enter into an agreement, in writing, with the claimant to refer the matter in controversy to one or more disinterested persons to be approved by the surrogate.

Where a will was admitted to probate February 26, 1906, and letters testamentary were issued and a publication of notice to creditors was begun on the same day, and, in September, 1906, claims against the estate upon promissory notes were duly presented to the executor who, on the 18th of September 1906 served upon the claimants a notice in writing as follows: "Please take notice that I doubt the justice or validity of your claim against the estate * * * both as to the execution and delivery of the alleged note and the lack of good and valuable consideration therefor and hereby offer to enter into an agreement in writing with you to refer the matter in controversy to one or more disinterested persons to be approved by the Surrogate

* * * pursuant to the provisions of section 2718 Code of Civil Procedure," and shortly after the service of said notice the attorneys for the respective parties made an oral agreement to refer the claims under the statute, but no such reference was made, and, on July 29, 1907, a legatee filed a petition that the executor show cause why he should not procure judicial settlement of the estate and pay petitioner's bequest, to which the executor filed an affidavit reciting the facts of the pending claims against the estate and that steps would be immediately taken on behalf of the executor to bring said claims to a hearing and determination, and the proceedings on such citation are adjourned from time to time, and, on the 19th of November, 1908, the executor filed his petition for a judicial settlement of his accounts and the claimants, upon the return of the citation, asked to have the status of their claims determined, the executor claiming that they were barred by the short Statute of Limitations under section 1822 of the Code of Civil Procedure, *held*, that the circumstances all plainly indicated that none of the parties understood that the executor had taken such final and definite action regarding said claims as to bring them within the operation of section 1822 of said Code, the notice to the claimants distinctly proposing that the claims be disposed of pursuant to the provisions of section 2718.

Proceedings on judicial settlement of executor's account.

W. W. Waring, for executor; George E. Spring, for creditors.

DAVIE, S.—The only controversy upon this accounting relates to the status of certain claims presented against the estate.

The will of decedent was admitted to probate February 26, 1906, and letters testamentary were issued upon the same day. Directly thereafter the executor began publication of notice to creditors. In September of the same year three claims, properly verified, aggregating \$650, based upon promissory notes of the decedent, were duly presented to the executor, who thereupon caused a notice in writing to be served upon the claimants, of which the following is a copy:

"Estate of Miranda Scheetz, Deceased:

"Please take notice that I doubt the justice or validity of your claim against the estate of Miranda Scheetz, deceased, both

as to the execution and delivery of the alleged note and the lack of good and valuable consideration therefor and hereby offer to enter into an agreement in writing with you to refer the matter in controversy to one or more disinterested persons to be approved by the Surrogate of the County of Cattaraugus, N. Y., pursuant to the provisions of section 2718, Code of Civil Procedure.

"Dated Sept. 7th, 1906.

"Yours, &c.,

ORREN F. FARRINGTON,

"Executor of the last will &c. of Miranda Scheetz, deceased.

"To (naming claimant)."

These notices were served upon the 18th of September, 1906. Shortly after service of the notices the attorneys for the respective parties made an oral agreement to refer the claims, under the statute. No referee, however, was agreed upon, the attorney for the executor asserting that he desired to confer with his counsel upon that subject. Some discussion then ensued as to which claim should be tried first. From time to time thereafter the subject of selecting a referee was considered between the attorneys, the situation relating thereto being more fully set forth in the portion of the evidence of the attorney then representing the executor, hereinafter quoted. On July 29, 1907, a legatee filed a petition for citation to the executor to show cause why he should not procure judicial settlement of the estate and pay petitioner's bequest. On the return day of the citation the executor appeared and filed the affidavit of his attorney, verified August 15, 1907, which, among other things, stated: "Originally, Messrs. Curtis & Curtis of the village of Franklinville, aforesaid, appeared for each of said claimants; but George E. Spring of said village has been substituted for the claimant James Squires, and efforts have been made from time to time to agree upon a referee or referees to hear and decide upon the claims; but, so far, none has been agreed upon and said claims

are now pending; that, from the peculiar circumstances surrounding said claims, deponent believes and has advised said executor and others interested in the estate, including the petitioner in this proceeding, that the interests of said estate will be benefited, instead of jeopardized, by delay in the trials; deponent further says that he has written Delia Harrison, the petitioner in this proceeding, several times, advising her of said claims, the action of the executor thereon, and generally the attitude and plans of deponent and said executor and, in addition, has frequently given such information to one James Adams, a messenger of petitioner; and, until the service of the notice to show cause issued herein upon her petition and served upon said executor, had no knowledge or information that petitioner did not fully acquiesce in the management of said claims; that steps will be immediately taken on behalf of said executor to bring said claims to hearing and determination."

The proceedings on the citation to show cause were adjourned from time to time; and, on the 19th day of November, 1908, the executor filed his petition for a judicial settlement of his accounts and citation was issued; and thereupon the two proceedings became merged. On the return day of the citation for settlement, the executor appeared by W. W. Waring; and the claimants appeared by the said Spring and asked to have the status of these demands determined, the executor contending that they were barred by the short Statute of Limitations.

While the Surrogate's Court possesses no jurisdiction to adjudicate upon the merits of these claims, it has authority to determine whether they have been properly presented, allowed or rejected. *Potts v. Baldwin*, 67 App. Div. 434; *Matter of Miles*, 33 Misc. Rep. 147; *affid.*, 170 N. Y. 75; *Matter of Von der Leith*, 25 Misc. Rep. 255.

When a claim is properly presented to the representative of an estate, one of two conditions arises:

First. The representative possesses, or assumes to possess, sufficient information regarding the merits of the claim to justify him in allowing or absolutely rejecting the same. In case of rejection, if the claimant is dissatisfied with the action of the representative, his mode of procedure is defined by the provisions of section 1822 of the Code of Civil Procedure. This section provides: "Where an executor or administrator disputes or rejects a claim against the estate of a decedent, exhibited to him, either before or after the commencement of the publication of a notice to creditors requiring the presentation of claims, as prescribed by law, unless a written consent shall be filed by the respective parties with the surrogate that said claims may be heard and determined by him upon judicial settlement of the accounts of said executor or administrator as provided by section twenty-seven hundred and forty-three, the claimant must commence an action for the recovery thereof against the executor or administrator, within six months after the dispute or rejection, * * * in default whereof he, and all the persons claiming under him, are forever barred from maintaining such an action thereupon, and from every other remedy to enforce payment thereof out of decedent's property," or

Second. The representative, while entertaining doubt regarding the validity of the claim, does not possess sufficient knowledge to justify him in absolutely allowing or rejecting the same. In such a case, section 2718 of the Code defines the method of procedure. This section provides: "If the executor or administrator doubts the justice of any such claim, he may enter into an agreement in writing with the claimant to refer the matter in controversy to one or more disinterested persons, to be approved by the surrogate. On filing such agreement and approval in the office of the clerk of the Supreme Court in the county in which the parties or either of them reside, an order shall be entered by the clerk referring the matter in controversy to the person or persons so selected. On the entry of such order

the proceedings shall become an action in the Supreme Court," etc.

These two sections are not to be read or construed together. They are entirely independent; they relate to entirely different conditions. The short Statute of Limitations springs from the operation of the provisions of section 1822, but not of section 2718; hence, if the provisions of the former section are applicable to this case, the claims are barred, no action having been commenced and no consent filed that the claims might be determined by the surrogate within the statutory period. If, on the contrary, the phraseology of the notices served, the conduct of the parties and their attorneys and all the attendant circumstances indicate that it was the intention and understanding of the parties that these claims were to be disposed of in some legal manner, then the case is governed by the provisions of section 2718, and the claims are not barred.

The adjudicated cases agree that nothing short of an absolute, definitive and unequivocal rejection of a claim will subject the same to the forfeitures provided for in section 1822 of the Code. In *Hoyt v. Bennett*, 50 N. Y. 538, Allen, J., considering this proposition, says: "To entitle an executor or administrator to the benefit of the short Statute of Limitations, by which one having a claim against the estate of a deceased person may be barred of his action and forfeit his claim, the representative of the estate must, in all essentials, comply with the statute creating the bar. Neither the statute nor the acts of executors or administrators under it are to receive a liberal interpretation or to be extended by implication beyond their natural and ordinary import; * * * justice to the claimant, as well as the reasonable interpretation of the statute, requires that the act of the executor or administrator, in disputing or rejecting the claim which is to put the claimant to an action within the brief period prescribed, upon pain of forfeiting his claim, should not be ambiguous or equivocal, capable of two interpretations, but de-

cided, unequivocal and absolute; such an act as will leave no reasonable doubt that the claim is definitely disputed or rejected, so that the claimant will be without excuse for not resorting to his action within the time required to save his claim."

This authority is cited in *Ulster County Savings Inst. v. Young*, 161 N. Y. 23, where Martin, J., in the opinion, says: "The statute is penal in its character and should be strictly construed; * * * Before this statute can be invoked by a representative as a bar to the claim against the estate he represents, a notice requiring the presentation of claims must be published, a claim in writing must be presented to the executor or administrator, and it must be plainly disputed or rejected by him."

To the same effect are *Potts v. Baldwin*, 67 App. Div. 434; *Reynolds v. Collins*, 3 Hill, 36; *National Bank of Fishkill v. Speight*, 47 N. Y. 668; *Miller's Estate*, 27 N. Y. St. Repr. 784; *Coleman v. McClure*, 47 Barb. 206.

The phraseology of the notice in this case merely expresses a *doubt* in the mind of the executor, regarding the validity of the claims; it contains no words of positive, final rejection, but, on the contrary, it expresses a willingness on the part of the executor to co-operate with the claimants in securing definite judicial investigation of the merits of the claim; it makes no reference to section 1822 of the Code, but distinctly proposes that the claims be disposed of pursuant to the provisions of section 2718. The agreement of the attorneys to refer, the reasons presented by the executor's attorney for not immediately agreeing upon a referee and the statements contained in the affidavit filed by the executor upon the return of citation to show cause, all plainly indicate that none of the parties understood that the executor had taken such final and definite action regarding these claims as to bring them under the operation of section 1822 of the Code.

Under the conditions disclosed by the testimony of the executor's attorney, fully corroborated by the testimony of Mr. Curtis, the former attorney for the claimants, it would be unreasonable to hold that these claims were barred by the provisions of section 1822 of the Code. *Matter of Eichman*, 33 Misc. Rep. 322.

In the case last cited, the phraseology of the notice was substantially the same as the notices served in this case, and Abbott, S., held that it was insufficient to set the short statute running.

This proceeding will stand adjourned to February 11th, eleven a. m.; and, if it then appears that legal proceedings have been instituted for the enforcement of these claims, the accounting will be stayed until final termination of such proceedings.

Decreed accordingly.

**Matter of the Judicial Settlement of the Estate of CHARLES
SERGANT, Deceased.**

(Surrogate's Court, Oneida County, January, 1909.)

**EXECUTORS AND ADMINISTRATORS: DEBTS AND LIABILITIES OF THE ESTATE—
EXHIBITION, ESTABLISHMENT, ALLOWANCE AND ENFORCEMENT OF CLAIMS
—EVIDENCE—DEGREE AND SUFFICIENCY: RIGHTS AND LIABILITIES BE-
TWEEN REPRESENTATIVE AND ESTATE—ITEMS CHARGED OR CREDITED—
RENTS AND PROCEEDS OF LAND.**

Where a man, his wife and son unite in testifying to transactions the effect of which would be to increase the amount of an estate in which they are interested, but the details are improbable and inconsistent with established facts and suggestive of fraud and perjury, and the character of the witnesses is doubtful and their testimony is characterized by evasion and by lack of memory upon such circumstances as are not requisite for the maintenance of their claim, the surrogate is justified in refusing to give credence to their testimony and in rejecting the claim.

Upon the judicial settlement of the accounts of an executrix, she is not chargeable with the proceeds of real estate of the testator which was not sold by her in her capacity as executrix.

See 72 Misc. 630.

Proceeding upon the judicial settlement of the account of an executrix.

Brown & Brown (Charles D. Thomas, of counsel), for petitioner; J. W. Watts, personally, and for M. Cordelia Utter, as administratrix; Henry F. & James Coupe, for Charles M. Beal, contestant.

SEXTON, S.—Charles Sergeant died at Bridgewater, N. Y., January 23, 1892, and left a will, dated June 11, 1884, which was duly admitted to probate June 6, 1892, and letters testamentary were issued to Ann Maria Beal.

An inventory was filed August 2, 1892, showing an estate of \$3,902.66. July 20, 1893, an account was filed, showing a balance in her hands for distribution of \$3,249.93. July 23, 1903, a decree settling and adjusting said account was left at the surrogate's office, and is now with the papers on file, which, though complete, was not signed by the surrogate.

The will of Charles Sergeant provided: "After all my lawful debts are paid and discharged, I give, devise and bequeath to Ann Maria Beal, wife of my friend, John Beal, of Bridgewater aforesaid, all my property both real and personal, of which I die possessed, to be hers during her lifetime, and after her death, the avails of my property, of which she has the use and income during her lifetime, is to be divided equally among her surviving children."

Said Ann Maria Beal died May 30, 1907, leaving William J. Beal, Charles M. Beal and M. Cornelia Utter, her surviving children. William J. Beal was a subscribing witness to the Sergeant will, and was used to prove it.

On June 24, 1907, said Charles M. Beal, and his sister, M. Cornelia Utter, were duly appointed administrators with the will annexed of the Sergant estate, and filed separate bonds. Ann Maria Beal, executrix of the Sergant estate, left a will, which was probated June 24, 1907. Letters testamentary were issued to William J. Beal.

October 2, 1907, William J. Beal, as executor of the Beal estate, filed his account of the proceedings of Ann Maria Beal in the Sergant estate, showing a balance of \$3,221.31.

October 24, 1907, objections were filed to said account by said Charles M. Beal, alleging that the account in the Sergant estate should be surcharged with \$1,750, the amount of a note, dated April 1, 1888, payable to Charles Sergant, or bearer, with use, and signed by the contestant, and claimed to have been fully paid by him to Ann Maria Beal, as executrix of the Sergant estate. That said Sergant estate should also be charged with \$385, alleged proceeds of some land, belonging to the Sergant estate, conveyed by Ann Maria Beal to the Unadilla Valley Railway Company, by deed dated October 15, 1892.

All of the evidence given upon the trial was confined to these items.

The contention of the contestant is, that he, April 1, 1888, borrowed \$1,750 from Charles Sergant, and gave him his note therefor, and after his death the contestant paid Ann Maria Beal, executrix of the Sergant estate, all interest on said note, and April 1, 1895, \$1,855, in full of principal and interest, and took the note into his possession. That the Sergant estate should now account for the principal of said note, \$1,750.

The estate contends that the face of said note, with the four indorsements thereon, all in the handwriting of contestant, is a fabrication, and never was in the possession of Charles Sergant, or his executrix, Ann Maria Beal.

As to the \$385, the expressed consideration in said deed, the estate contends that this court has no jurisdiction to determine that item.

The history of the note as given by the contestant, his wife and son, is substantially, that it was written by Charles M. Beal, April 1, 1888 (Easter Sunday), at his home in Bridgewater, on a piece of paper taken from an account book, and with a gold pen used by him when a boy in school. The ink used was taken from a small, wooden, pocket inkwell, with screw cap and small glass bottle inside, into which no ink had been put prior to April 1, 1888, since he left school at the age of nineteen years, a period of thirteen years and about thirty-one years ago. The note was then delivered to Sergeant, and contestant received from him in cash \$1,750. It was not put in any bank. Sergeant took the note, folded it and put it in his pocket. April 1, 1892, the contestant paid his mother, Ann Maria Beal, \$420, back interest, and paid it each year till April 1, 1895, when he paid her \$1,855 at her house, in full of principal and interest, and took up the note, returned home and delivered it to his wife. The note then bore all the evidences of hard usage and creases, and was in substantially the same condition as to folds and creases, and in the same shape and condition as when produced upon the trial in court. The wife kept it until the trial.

The following words and figures appear upon the back of the note, to wit:

"April First, 1892, Received on the with note Int four Hundred and Twenty dollars, \$420.00."

"1893, April first I Received on the with in note In one Hundred and five dollars, \$105.00."

"1894, April first I Received on the within note one Hundred and five dollars, \$105.00."

"1895, April 1, I Received on the with in note In full payment Eighteen Hund and fifty-five dollars, \$1855.00."

They were made at the time of their dates by the contestant, with the identical pen and ink used in drawing the note. The ink well had never been filled or ink changed in any manner

between the time contestant left school and the last indorsement, April 1, 1895, a period of twenty years. The note shows evidence of being folded from end to end a number of times. When contestant received the note, and before he tore his name off, it had on it the creases from folds.

On April 1, 1895, the contestant took from his house, \$1,855, and with his son, Adelbert, who was going to school, drove to his mother's house in the village of Bridgewater, where Adelbert left the wagon and went to school. The contestant showed his son a large roll of money on that morning. The money to pay the note was made up of \$1,000, obtained from Jones & Townsend in cash, and from a sand bank in the cellar, and a tea pot in the house of contestant, and some was furnished by Sarah J. Beal. A portion of the money came from baling hay and an auction sale, held in 1894. Adelbert, the son, frequently took dinner with his grandmother in 1895, and, during the month of March or April of that year, she told him several times she wanted him to tell his father that she wanted some money on the Sergant note, or all of it, and he told his father each time. She showed Adelbert the note; he testified it looked very much like exhibit 2. "It was a piece of pad paper." Adelbert and his father were at Ann Maria Beal's April 1, 1895, in the morning. Adelbert took dinner with Mrs. Beal that day, and she told him in substance that she had straightened all up with his father on the Charles Sergant note, and that things were square. This was at about "quarter to one o'clock" in March or April. Two or three days thereafter, Adelbert next saw said note in his father's possession.

We will first consider the \$1,750 note, of which the following is a copy:

"Bridgewater April first 1 1888 For value received I promise to pay Charles Sergant or bearer one year from date \$1750.00 Seventeen Hundred and fifty dollars with use.

"Ch."

In support of the note is the evidence of contestant, his wife, Sarah J. Beal, and son, Adelbert. Contestant is fifty-two, his wife fifty, and son twenty-five years old. It is claimed by the contestant that he paid the note in full, with interest, April 1, 1895, at which time his son, who testified to that payment, was twelve years old.

Is the note, Exhibit 2, the offspring of honesty, or was it conceived in avarice, born of fraud, and nourished by perjury? It was made on Easter Sunday, notwithstanding the general belief among farmers that such notes are void. The contestant testified that he received from Sergeant \$1,750 in cash. It was not put in a bank, nor does it appear why it was borrowed. During Sergeant's life no interest was paid. Sergeant collected his interest when due. The inventory shows two mortgages on which there was no past due interest at Sergeant's death. Exhibit 2 is not mentioned in the inventory of the Sergeant estate, yet it was then more than four years old. There is no claim that any other personal property was omitted from the inventory. The note was seven years old when contestant and others of his family say it was paid to his mother. William J. Beal, his wife, Kittie, and Sergeant, lived with Ann Maria Beal for many years, the said Sergeant all his life; still on the evidence at the time of Sergeant's death none of these persons knew of the existence of Exhibit 2, unless possibly Sergeant. There was no trouble in finding all of the Sergeant securities, and other papers, why then should this note have escaped the appraisers? Sergeant's object in giving the life use of all of his property to his friend, Ann Maria Beal, was to provide her with an income for her life. Why should he withhold from her, or mislay, Exhibit 2, and thereby deprive her of an annual income of \$105, and at the same time so leave the two mortgages and the bank certificate of deposit as to be readily found? If Exhibit 2 was found among Sergeant's effects, what motive could Ann Maria Beal have in withholding it from the inventory, as she could only use the in-

terest of the same? If she did withhold it, or knew of its existence, her affidavit to the inventory was willfully false, as was also her affidavit to her account, filed July 20, 1893, because on that date, on the evidence of the contestant, \$420 interest had been paid to her on the Sergant note, April 1, 1892, and \$105 April 1, 1893.

On June 15, 1892, two months and a half after she had received \$420 interest on Exhibit 2, according to contestant's testimony, she verified the inventory, using these words: "That the inventory of the goods, chattels and credits of said decedent, by this deponent made, and to this deposition annexed, is in all respects just and true, that it is a true statement of all the personal property and effects of said deceased, which have come to the knowledge of this deponent," etc.

The following year, June 20, 1893, after, on contestant's evidence, she had been paid another year's interest of \$105, she says, in Schedule B of her account: "There has been no other asset which has come to the hands of the executor since taking said inventory, except the sum of \$168, accrued interest on said bonds and mortgages mentioned in Schedule A, and set forth in the inventory." In her verification of said account the following language is used: "The foregoing annexed account contains, according to the best of knowledge and belief, a full and true statement of all receipts and disbursements on account of the estate of said decedent, and also of all moneys and other property belonging to said estate, which have come to her hands, or which have been received by any other person by her order or authority, for her use, and she does not know of any error or omission in said account to the prejudice of any person interested in the estate of said deceased," etc.

If what Ann Maria Beal swore to as aforesaid was true, then what the contestant and his wife and son have testified to is partly false.

Did Charles M. Beal pay his mother, Ann Maria Beal, the face of Exhibit 2, with one year's interest on April 1, 1895, amounting to \$1,855, when he knew that his mother was only entitled to the income of said note during life, and when he also knew that if he withheld the payment of the principal until his mother's death, he, being one of the residuary legatees under the Sergant will, would be entitled to letters of administration with the will annexed, and could then pay Exhibit 2 into said estate, and be sure to receive his share thereof. He also knew that if he paid it to his mother, and she spent it, and died without leaving sufficient property to repay it, he would lose his share of it. He probably always knew his mother's financial condition.

Ann Maria Beal at the time of her death held contestant's note for \$1,000 dated March 31, 1892, which she bequeathed to him in her will. If the contestant succeeds in establishing Exhibit 2, he will have \$1,000 out of his mother's estate, represented by Exhibit B, one-half of the Sergant estate; and, in addition thereto, one-half of the amount of Exhibit 2, which his mother's estate will be able to pay.

As evidence of the good faith and honesty of the contestant, in his effort to surcharge the account of his mother's representatives in the Sergant estate, with the amount of said Exhibit 2, it is proper to consider the fact that M. Cornelia Utter, a sister of contestant, did not join in the contest, though she would materially benefited under the provisions of the Sergant will, should the contest succeed.

This lady lives in Utica, was not sworn as a witness and seemingly is not under the influence of either of her brothers, but knows them both well; hence her position in regard to the contest, while it does not rise to the dignity of evidence, is still significant.

After the death of Ann Maria Beal, May 30, 1907, the contestant applied for letters of administration with the will an-

nexed, in the Charles Sergant estate. Letters were issued to contestant and Mrs. Utter, his sister. They each filed separate bonds. If they had joined, one bond of \$7,000 would have been sufficient, as the petition of contestant showed an estate of only \$3,500.

Charles M. Beal alone verified the petition, and it does not appear why Mrs. Utter gave a separate bond.

There is another circumstance which invites attention. The petition verified by contestant contained this provision: "That the value of the estate of said decedent remaining unadministered, will not exceed the sum and amount of \$3,500.00." Said petition was filed June 5, 1907.

The inventory in said estate filed in 1892 showed a gross personal estate of \$3,902.66. July 20, 1893, an account was filed by contestant's mother in said estate, showing a balance in her hands for distribution of \$3,249.93, so that the petition for letters of administration with the will annexed in the Sergant estate, verified by contestant, stated an amount in keeping with the facts shown by the papers on file.

That the contestant knew all about the papers and their contents on file in the surrogate's office can be assumed from the following evidence given by him: "I was over there (surrogate's office) two or three times before I filed my petition. We looked at the papers there on these occasions. I had not made my petition for letters of administration with the will annexed, before I saw the papers."

When he verified his petition did he have in mind the \$1,750 paid into the Sergant estate? He knew that his mother's account on file showed \$3,249.93 as per inventory, and was filed in 1893, upon notice to him and without objection. He knew that to said sum must be added \$1,750, paid by him thereafter, making a total, in the Sergant estate, to be accounted for and which must come to his hands, as administrator with the will annexed, of \$4,999.93.

For the purposes of showing where the truth lies, it may be profitable to analyze the contestant as a witness. Out of ninety-one questions asked him by his counsel, he gave eighty-seven positive answers, and out of 332 questions asked him on cross-examination, he gave 126 evasive answers, many of which were: "I don't remember," "I can't say," "I don't recollect," and yet no reason appears why witness should not have been as clear, in regard to the matter inquired about on cross-examination, as those inquired about on direct examination.

The contestant's testimony, in regard to Exhibit 2, shows a very hazy and uncertain memory, and a mind so vacillating and contradictory that one is forced to inquire whether it is really traveling along an honest highway. He testified: "The indorsements on Exhibit 2 were made at the several dates that each of them is dated. I couldn't say whether the several indorsements on the back of Exhibit 2 were made upon the day they bear date. The second indorsement might have been made at my house. I have a distinct recollection where it was made. It was at my mother's. I don't remember whether Sergeant folded Exhibit 2. I will swear that I saw him fold it. I wrote all of the indorsements on the back of Exhibit 2 after the paper had been folded. I couldn't say whether the paper was folded at all when I wrote any of those indorsements. I don't know whether Exhibit 2 had been folded before I tore my name off it. When the paper came to me and before I tore the name from its bottom, it had on it these creases from folds."

When questioned as to where he got the \$1,855 which he claimed he paid to his mother April 1, 1895, in full of Exhibit 2, he wrested the laurels from the brow of Ananias, in the following reckless manner: "I got Townsend's check in 1895, before the 1st of April. Mr. Townsend gave me \$1,000 at his office. I don't say whether it was cash or check. I will swear that in 1895, William Townsend turned over to me \$1,000 in cash. In check or cash—I couldn't tell the amount of the

cash or state the amount of the check. I did not take the \$1,000 home in a lump. I do not know, it might have come a piece at a time. I took that money in a single lump home. That \$1,000 that I took home in a lump was made up of money, bills. I started home with this \$1,000 in bills from Townsend's office. I got the \$1,000 in bills from Townsend and Jones. I did not arrange to pay Jones and Townsend in any way. I gave them a note. I had in my house on April 1, 1895, \$1,000, that I got from the Nathaniel Kirkland estate. I paid the Jones and Townsend note when I got my \$1,000 from the Kirkland estate. I got this money from Jones and Townsend to pay the Sergant note (Exhibit 2)." The foregoing battle with truth seemed necessary to show where the money came from to pay Exhibit 2 as claimed. Jones & Townsend were contestant's attorneys in the Kirkland estate, and are both now living in Utica. They were not called as witnesses. Nor was the note given to Jones & Townsend by contestant produced, though it was requested, after contestant said he thought it was at his home. Contestant's wife accounts for the balance in these handy words: "I saw him get the money and count it. He went to his mother's to pay the note. The money was kept in a sand bank in the cellar, in a tea pot and different places. I had part of it. The money was got in different ways. He baled hay, and had an auction sale of stock, and he got from the Kirkland estate, \$500.00."

The action was in 1894. The contestant swore he got \$1,000 from the Kirkland estate. His wife says it was \$500. The contestant's wife, Sarah J. Beal, was impeached by six neighbors, and more effectually impeached herself by the following testimony: "I have lived in Bridgewater all my life. Fifty years." On cross-examination she testified: "Q. You lived for some time in Waterville with a man by the name of Cook?" No answer. By Mr. Thomas: "How long did you live in Waterville? A. Five or six years. Q. Was it five or

six years that you lived with some one else? A. I don't remember. Q. You don't remember whether or not you lived at Waterville and passed as the wife of a man by the name of Cook? A. I don't remember that. Q. You won't say that you did, Mrs. Beal? A. I don't remember." She said she was never married except to Mr. Beal. Such evidence staggers credulity. If she lived with a man in Waterville or went by the name of Cook before she married Mr. Beal, she still remembers it. To say "I don't remember" implies a former knowledge. The answer, "I don't remember," to such questions, is the perjurer's shelter. As the taste of the apple sat upon the tongue of Eve till she entered her tomb, so will the memory of a woman's first illicit conjunction with a man burrow in her brain till its habitation falls to dust.

There is another witness, Adelbert Beal, the son of the contestant, without whose evidence the contest must fail. He is twenty-five years old, and was only twelve years of age April 1, 1895. This witness was asked to give a conversation he had with his grandmother, Ann Maria Beal, when he was a mere child. He was equal to the demand. He said: "I went with my father, who showed me a large roll of money, on April 1, 1895, to my grandmother's. It was in the morning. I left father at my grandmother's and went to school and was recorded late that morning. I took dinner with grandmother that day and at about a quarter to one in March or April, she told me she had straightened all up with my father on the Charles Sergant note, and that things were square. Grandmother had showed me the note before. It was a piece of pad paper."

There is no doubt but that Exhibit 2 is a leaf out of a book. It is yellow and ruled crosswise with blue lines and lengthwise with red lines. It is about twelve and one-half inches long and five and one-quarter inches wide and when produced in court was folded so that it was five and one-quarter inches long and

one and one-quarter inches wide. It was thus folded when Beal gave it to his wife, April 1, 1895, who put it away and took care of it till the trial. The boy said he afterward saw the note his grandmother showed him, which was on a piece of pad paper, in his father's possession. This witness on cross-examination when pressed as to his connection with breaking into the Bridgewater depot and taking money, etc., on his counsel's suggestion, took refuge in the sheltering arms of his legal privilege and said: "I remain silent." No explanation was made by him touching this matter. When a case rests solely upon the evidence of a witness who thus willfully closes the door to his general character, it would be ravishing a court's discretion to give credence to his evidence, in this case, because of his doubtful character and presumptive interest, born of his natural desire in his father's success.

The thousand dollar note, Exhibit B, was seemingly on a piece of pad paper, and reads as follows:

"\$1000. Bridgewater, March 31/92 For value received I promise to pay Ann M. Beal One Thousand dollars with use at 5 per cent. Chas. M. Beal."

Exhibit B was drawn on a piece of paper with two-inch unruled margin at top, and balance ruled across the paper only. Exhibit B is five and one-quarter inches long and four and one-half inches wide. The writing is two and one-half inches long and four and one-half inches wide. Five indorsements in Ann Maria Beal's writing are on the back. They cover a space of one and one-half inches by four and one-half inches, and are as follows:

"Interest paid to April 1st, 93. 1894 Interest Paid. April 3d, 95 one years interest Paid. Interest Paid to April 6th 1896. \$5 five dollars paid July 12, 1901."

This evidence can be reconciled only upon the theory that the grandmother had in mind Exhibit B and may have told the boy to tell his father that she wanted her interest on that note.

In support of this is an interest indorsement on Exhibit B, dated April 3, 1895, and the boy's evidence, that the note he saw was on a piece of pad paper.

The indorsements on Exhibit B show that Ann Maria Beal could and did write as late as July 12, 1901. Mr. Watts, attorney, testified that she signed her affidavit to the inventory of the Sergant estate June 14, 1892, and July 20, 1893, wrote her name to her petition for an accounting twice; and to her account eight times. Why did she not sign the indorsement on Exhibit 2, if she ever received the money, particularly the last one, which purports to show a payment of \$1,855, April 1, 1895? They say she drank tea and smoked freely, which made her nervous. It was a queer grade of tea and tobacco, and with freakish effects, which enabled her to indorse payments on Exhibit B, from April, 1893, down to July 12, 1901, one of which was April 3, 1895, and wholly unfitted her to sign the memorandum of payment of \$1,855 on Exhibit 2, April 1, 1895, only two days earlier.

Upon the entire case I am reluctantly led to the conclusion that the father, wife and son, all interested, are engaged in a dishonest effort to reap where others have sown; and that Exhibit 2 is of scrub ancestry, and is now a distorted, unnatural, perjury-poisoned product. No disinterested person, in my judgment, can examine it, in connection with the evidence, without reaching the same conclusion. The contestant's expert witness, Mr. Day, testified: "There is nothing in the paper that shows that any indorsement was made across the folds. Where an indorsement is made across the lines the ink will flow a little. I do not see any flowing of the ink in the fibres of the paper in the last indorsement. The way the folds appear here on the back of the paper, Exhibit 2, did not exist when the writing was made in my opinion. The second and third indorsement have the appearance of having been written at the same time, at the same sitting. The four indorsements were not in my opinion

made with the same ink, out of the same small receptable. That is my opinion and conclusion."

John W. Truesdale, of Syracuse, an expert of wide experience in handwriting, testified in behalf of the estate: "After having examined Exhibit 2 under a glass I find no evidence of having been written over a creased surface. In my opinion all of the indorsements on Exhibit 2 were written before it was folded. When folds are written over, the ink spreads in the broken fiber so it may ordinarily be plainly seen. The face and body of Exhibit 2, and all the indorsements thereon were written at one and the same time, and by the same person. Writings by the same person made at different times vary considerably, caused by the physical condition of the writer, and his pen control. I find no such variation in the indorsements and body of Exhibit 2."

Exhibit 2 has five creases which cut through different lines of the four indorsements, and yet there is not the slightest evidence of ink spreading in the broken fiber of the paper. The evidence, as to the pen and ink used on Exhibit 2, which were both the pocket companions of the contestant in his school-boy days, seems incredible and Munchausen like to one accustomed to feed on truth and digest it with his food.

The courts have emphatically spoken in cases of this character, where all the nourishment, on which the contention is fed, is furnished by members of the same family.

In *Matter of Stevenson*, 86 Hun, 325, the court said: "Upon an accounting the affirmative of establishing more assets than are acknowledged by the inventory and account is with the party objecting and it should be established with reasonable certainty and not left to mere conjecture or suspicion." To the same effect are *Matter of Baker*, 42 App. Div. 370; *Matter of Rogers*, 153 N. Y. 328; *Matter of Mullan*, 145 id. 98.

In *Rix v. Hunt*, 44 N. Y. Supp. 988, cited in *Matter of*

Arkenburgh, 58 App. Div. 583, 69 N. Y. Supp. 125, the court said: "Where claims are presented against the estate of a decedent, they should be scrutinized with more than ordinary care in order to prevent, as far as possible, the allowance of unjust and fictitious demands against parties whose mouths are sealed by death."

In *Van Slooten v. Wheeler*, 140 N. Y. 624-633, the court said: "Public policy requires that claims against the estates of the dead should be established by very satisfactory evidence, and the courts should see to it that such estates are fairly protected against unfounded and rapacious raids." To same effect, *Matter of Marcellus*, 165 N. Y. 70-76.

In *Matter of Goss*, 98 App. Div. 489-491, the court said: "It is proper to observe at the outset that claims of this character against the estates of decedents, especially when in favor of near relatives, should be examined very carefully and should only be allowed upon the most satisfactory proof."

In *Roberge v. Bonner*, 94 App. Div. 342, 345, 346, the court said: "Contracts claimed to have been made by deceased persons to be enforced after death are to be regarded with great suspicion and the testimony upon which they are sought to be sustained closely scrutinized and the claim should be allowed only when established by strong and convincing evidence * * * They are the natural resort of unscrupulous persons who wish to despoil the estates of decedents."

In *Rousseau v. Rouss*, 180 N. Y. 116-120, the court said: "Thus, the evidence relied upon to establish the contract is, first, the testimony of the mother, who tried to swear \$100,000.00 into the pocket of her own child, and, second, the testimony of witnesses who swear to the admissions of a dead man. The former is dangerous; the latter is weak, and neither should be acted upon without great caution."

The following applies to evidence of Adelbert Beal, regarding his conversation with his grandmother as to Exhibit 2, with-

out which the contestant cannot succeed: "This was a casual conversation about a matter in which he was not interested. Such evidence of distant conversations has always been regarded as the most unsatisfactory and unreliable evidence." *Van Slooten v. Wheeler*, 140 N. Y. 624-631.

The rule that a fact testified to by a disinterested witness who is not discredited, which is not in conflict with other evidence, is to be taken as legally established, is not applicable to a claim made against a decedent's estate, since the person who could contradict the witness if his testimony be false is dead. *Hughes v. Davenport*, 1 App. Div. 182-184.

"In all classes of cases the rule, that the evidence of a disinterested witness is to be believed, is subject to the qualification that his story must not be improbable." *Walbaum v. Heaney*, 104 App. Div. 412.

"It is a maxim well known to the profession that, if a witness willfully and corruptly swears falsely to any material fact in the case, the court is at liberty to disregard the whole of his testimony." 29 Am. & Eng. Ency. of Law (1st ed.), 780, and cases cited.

It is claimed that Ann Maria Beal received \$385 from the sale of some real estate belonging to the Sergeant estate. In the Sergeant estate she had a life use, with no power of sale, hence if she sold, and received money for the land, it was not in her capacity as executrix. That being so, this court has no jurisdiction to compel payment out of her estate into the Sergeant estate of any amount received by her in any other capacity than that of executrix. It has been repeatedly held that the surrogate has no power to direct or control an administrator as to property to which he did not have title, or of which he had no right to take possession as administrator. *Matter of Kane*, 38 Misc. Rep. 276-282, and cases cited.

"A Surrogate's Court has no jurisdiction over realty left by a decedent, or its avails, unless brought within it by a will,

or by a statute for the purpose of being dealt with for some special purpose, like the payment of debts in case the personalty is inadequate." *Sweeney v. Warren*, 127 N. Y. 426-435.

The burden of proof is on the contestant and he has wholly failed to establish, with reasonable certainty, that the account filed herein should be surcharged with the amounts as claimed by him.

A decree may be submitted, passing and settling the account as filed.

Decreed accordingly.

Matter of the Probate of the Last Will and Testament of WILLIAM SCHLEGEL, Deceased.

(Surrogate's Court, Kings County, February, 1909.)

WILLS—THE TESTAMENTARY INSTRUMENT OR ACT—EXECUTION OF WILL—IN GENERAL—SIGNATURE—PLACE FOR SIGNATURE; SIGNATURE OF WITNESSES.

Where a will is drawn on a printed blank and in the body of it are written the words "continued on other side," where the directions for the disposition of the testator's estate are written, and the testator signs his name at the beginning, in the space intended for a recital of his name, and again at the bottom of the second page, but does not sign in the place intended for his signature but a notary public who supervised the execution of the instrument signed there, and the attestation clause follows the notary's signature, the provisions of the statute have not been substantially complied with and the will should not be admitted to probate.

Proceeding for the probate of a will.

Leon Forst, for proponent; Joseph A. Kennedy, special guardian.

KETCHAM, S.—Probate must be denied. The propounded paper consists of two pages. The first contains the form of a will upon a printed blank, in the body of which are written the words "continued on other side." The other page is filled with directions for the disposition of property after death.

At the end of the attempted will on the first page there is no signature by the decedent. In the place in which such signature might be looked for, the notary who drew the will has written his own name, with the initials "N. P.," indicating his office.

Subjoined to this signature is a printed attestation clause, signed by two witnesses, who certify that William Schlegel, the supposed testator, has subscribed the foregoing will, and declared it to be his will and has requested them to sign as witnesses.

In the blank space at the opening of the will for the recital of the name of the testator, the decedent has written his name. At the end of the second page the decedent has again written his name, but it is not attended by any signature of witnesses.

Thus it appears that the notary has permitted the deceased to sign in every place where his signature has no testamentary value or efficacy, and has himself signed in the one place where his misguided employer should have signed.

The grotesque result is an instrument which, while it plainly tells what the decedent wanted to do and tried to do with a substantial estate, forbids the fulfillment of his affectionate purpose and leaves the disposition of his fortune dependent only upon the blunders of an incompetent who had no business to attempt a will.

Probate denied.

Matter of the Judicial Settlement of the Account of CHARLES A. McINERNEY and JOSEPH P. MULQUEEN, as Surviving Executors of the Last Will and Testament of MARY McINERNEY, Deceased.

(Surrogate's Court, Kings County, February, 1909.)

SURROGATES' COURTS: NATURE AND EXTENT OF JURISDICTION—ADMINISTRATION OF DECEDENTS' ESTATES—SETTLEMENT OF CLAIMS ON ACCOUNTING BY REPRESENTATIVES—CLAIMS AGAINST REPRESENTATIVES: PROCEDURE AND REVIEW—HEARING, REHEARING AND DECISION—DECISION—SUSPENDING DECISION PENDING DECISION IN OTHER COURT.

The Surrogate's Court has no jurisdiction, upon the settlement of the accounts of a testamentary trustee who is also one of the beneficiaries of the trust, to pass upon a claim that he should account to the estate for the injury inflicted upon it by reason of his having joined with other beneficiaries in the purchase of a portion of the real estate for their own interest and profit.

And the court will not examine such dealings of the trustee with the estate in order to determine whether or not the trustee is entitled to commissions and thus make an adjudication conclusive upon the parties, but will reserve the question of commissions and leave the parties to settle the question of the trustee's liability in the Supreme Court where complete relief may be given.

Proceeding upon the settlement of accounts of testamentary trustees.

Sparks & Fuller, for executors; Edward J. Flanagan (James C. Church, of counsel), for contestant; Franklin M. Tomlin, special guardian.

KETCHAM, S.—In the settlement of the accounts of testamentary trustees it is claimed that, upon the sale of real estate, pursuant to a power of sale in the will, a trustee, who is one of the seven beneficiaries under the will, joined with three other beneficiaries in the purchase of a portion of the real es-

tate, in part for his own interest and profit, and that he should account for any injury inflicted upon the estate by his acts in this regard.

The court has no jurisdiction of the question thus presented. It is of equitable cognizance and belongs exclusively to a court of general equity powers. *Matter of Valentine*, 1 Misc. Rep. 491; *Matter of Randall*, 152 N. Y. 508.

It is probable that the surrogate has power to examine the trustee's dealings with the subject of his trust in order to determine whether or not the trustee is entitled to commissions; but in the event of the exercise of jurisdiction in this respect the surrogate's finding that the trustee was faithful or unfaithful would conclude the parties in any action in which the questions cognizable in equity would be presented.

Thus the court, which has no power to make a comprehensive judgment as to the trustee's conduct and any liability that might result therefrom, would impose its adjudication upon a court to which the complete jurisdiction attaches.

To avoid a result so droll and inconvenient, the question of commissions will be reserved; and counsel may present their views as to whether this proceeding shall be adjourned pending the hearing of the question in the Supreme Court, or whether the decree shall be entered for partial relief, with leave to apply upon the foot thereof for further direction.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of JAMES TAYLOR, Executor of the Estate of WILLIAM TUNSTILL, Deceased.

(Surrogate's Court, Kings County, February, 1909.)

**SURROGATES' COURTS—THE COURT AND ITS OFFICERS—POWERS OF SUCCESSOR
—COMPLETION OF PROCEEDINGS.**

When the term of office of a surrogate, before whom a proceeding for the judicial settlement of an executor's account has been heard, expires after he has made a decision but before the findings and decree are completed, his successor in office may sign the findings and make the decree.

Motion to vacate a decree.

James E. Delaney, for executor; Henry Herrold, for Marie Kennerer.

KETCHAM, S.—This is a motion to vacate a decree on the ground that the surrogate had no power to make the same or the findings upon which it was based.

The former surrogate, after a trial, rendered a decision and, when his term of office expired, had not made proposed findings and decree, which were presented by one of the parties for his signature. These findings and decree were left uncompleted and unsigned when the surrogate's term of office expired and have since been signed by his successor.

The act sought to be vacated was required of the present surrogate by section 2481 of the Code, subdivisions 8 and 9, and the motion must be denied.

Motion denied.

Matter of CHARLES T. GEYER, as Executor and Trustee Under the Last Will and Testament of ALLEN ALEXANDER, Deceased.

(Surrogate's Court, Kings County, February, 1909.)

SURROGATES' COURTS—PROCEDURE AND REVIEW—ORDERS AND DECREES—ENFORCEMENT—CONTEMPT—DISCHARGE FROM IMPRISONMENT.

The Surrogate's Court will not discharge from imprisonment a testamentary trustee who stands committed for contempt for failure to pay over moneys in accordance with a decree of said court, because of inability to pay the fine, where the only proof of his inability is his own mere general statements that he has no property and no means of earning money except his personal services.

Motion for the discharge from imprisonment of a testamentary trustee.

Lloyd & Maddox, for petitioner; Frederick L. Taylor, for Gussie P. Alexander.

KETCHAM, S.—This is a motion for the discharge from imprisonment of a testamentary trustee, who stands committed for contempt until he shall have paid to the persons whose rights were impaired by the misconduct which constitutes his contempt a fine of \$20,023.79, or unless the court shall see fit sooner to discharge him.

There is no proof tending to show that the petitioner is unable to pay this fine, unless his own statements in that regard be accepted.

These statements contain nothing more than a generalization that the petitioner has no property of any kind whatever, has nothing, has no means of earning money except his personal services.

These averments cannot be the basis for the relief sought.

The motion should be denied.

Motion denied.

Matter of the Appraisal Under the Transfer Tax Act of the
Estate of GEORGE B. WARREN, Deceased.

(Surrogate's Court, Rensselaer County, February, 1909.)

TAXES—INHERITANCE AND TRANSFER TAXES: PROPERTY AND INTEREST SUBJECT TO TAX—IN GENERAL—ESTATE BY APPOINTMENT BY WILL PURSUANT TO WILL OF REMOTE ANCESTOR: ASSESSMENT—REVIEW OF PROCEEDINGS—EFFECT OF FORMER APPEAL.

Where an appeal is brought from an order assessing a transfer tax but upon stipulation of the parties the appraiser makes an amended report and the appeal is never heard, the parties have not lost their right to apply for a modification of the amended order, by reason of such appeal, or by reason of the expiration of the time to appeal from the amended order.

Where a testator gave a share of his estate to each of several children for life and at the death of each to such persons and in such proportions as such child should by will appoint, and as a part of his or her estate, and in default of such will to the heirs of such child, and one of the children of the testator leaves a will by which the power of appointment is exercised so as to postpone the time of distribution and to bestow the estate in a different manner than his father's will provided in default of such appointment, his heirs cannot elect to take under the father's will but must take under the son's will and the estate is liable to taxation under the laws relating to taxable transfers.

Application for an order modifying an amendment order assessing a transfer tax.

Shaw, Bailey & Murphy, for petitioners; John P. Kelly, for State Comptroller.

HEATON, S.—This is an application by the daughter and three sons of George B. Warren, Jr., deceased, to obtain an order modifying the amended order of the surrogate, made on the 18th day of May, 1906, assessing a transfer tax on the property alleged to have passed under a power of appointment exercised by the will of said deceased.

The Comptroller of the State claims:

First. That the surrogate has no power to modify such amended order (a), because the original order made May 6, 1906, was appealed from, which exhausted the right of the petitioners, and (b) because the time to appeal from the amended order has expired.

It appears from the record that the appeal from the original order was never heard by the surrogate, but that upon stipulation of the parties the appraiser made an amended report upon which an amended order was made. Under such circumstances, it could not be held that the petitioners had lost their right to apply for a modification of the amended order for the reason alleged.

The Comptroller further objects to the jurisdiction of the surrogate on the ground that the time to appeal from the amended order has expired and that the relief sought cannot be obtained except upon appeal.

The validity of this objection depends upon whether the error, from which the relief is sought, is one of fact or of law.

Upon examining the question involved, it appears that the appraiser has assessed a large amount of property as being transferred by the will of the deceased under a power of appointment which the petitioners claim did not pass by virtue of such power, but vested and passed under the will of the father of the deceased, who died before the Transfer Tax Act took effect.

The surrogate has no jurisdiction to assess a tax upon property which does not pass the will of the deceased. If the power of appointment has not, in fact, been exercised, or if, in fact, no property has been transferred by it, the surrogate was without jurisdiction to assess a tax by reason of any succession; and he may modify his order which has held that a transfer or succession did take place which did not in fact take place. *Matter of Backhouse*, 110 App. Div. 737; *affd.* 185 N. Y. 544.

Therefore, the motion of the Comptroller to dismiss the proceedings for lack of jurisdiction is denied.

Whether or not the application shall be granted upon the merits depends upon the effect of the exercise of a power of appointment given by the will of George B. Warren, Sr., who died May 8, 1879, to George B. Warren, Jr.

The power was granted in these words: "I give his or her said share to such persons and in such proportions as such child shall by will duly executed appoint and as a part of his or her estate and in default of such will, I give the same to the heirs of such child as if such child had died seized and possessed thereof." This language followed a gift of the residue of testator's estate to trustees in trust for the use of his three children. George B. Warren, Jr., died October 8, 1905, leaving a widow and four children. By his will he sets aside 250 shares of the stock of the Rensselaer and Saratoga railroad, out of and from his share of his father's estate, for the use of his daughter Mary, during her life, with remainder over to his three sons. In the next item, he declares that he executes the power of appointment under his father's will "by appointing in his my last will and testament my three sons * * * as the persons to inherit absolutely and forever the same share and share alike, subject, however, to a life interest therein by my beloved wife * * * as appears more specifically set out in the clause following."

By section 220 of the Transfer Tax Law, the right of succession to property passing under a power of appointment is taxable. *Matter of Delano*, 176 N. Y. 486, revg. 82 App. Div. 147.

A superficial examination of several decisions upon this subject made by the courts might lead one to think that they have not been entirely harmonious, but a careful study of them shows the principle which has been applied.

In *Matter of Vanderbilt*, 50 App. Div. 246; *affid.*, 163 N. Y. 597, the testator directed that, upon the death of Cornelius, the

fund should be paid to his lawful issue *in such shares or proportions* as Cornelius might by his last will have directed or appointed. Cornelius by will made an *unequal* division among his children, and a tax was upheld. In the Delano Case, 176 N. Y. 486, revg. 82 App. Div. 147, the power was "to give * * * in such manner and proportions as she may appoint," among several classes named; and, in event of her failure to appoint, the estate was to be divided among the persons composing those classes. The power was exercised by appointing one person to receive the whole estate, and a tax was held to be assessable.

In Matter of Dows, 167 N. Y. 227, affg. 60 App. Div. 680; *affd., sub nom., Orr v. Gilman*, 183 U. S. 278, the power declared that the estate should "vest absolutely, and at once, in such of his children him surviving and the issue of his deceased children as he (the donee of the power) may by his last will and testament designate and appoint, *and in such manner and upon such terms* as he may legally impose." The power was exercised by creating life estates in his children dependent upon a term of years or a prior death and giving the remainder of each life estate to the other child. A tax was upheld.

The principle applied in these and other cases was that, the power being effectively exercised and it being necessary to resort to the will by which it was exercised, before title could be established to the property claimed, the transfer was by force of the power of appointment and was subject to taxation.

The cases in which the tax was not upheld apply the reverse of this principle. In Matter of Lansing, 182 N. Y. 238, modifying 103 App. Div. 596, the attempt to exercise the power neither increased nor diminished the estate of the beneficiary as fixed by the will creating the power.

In the Backhouse Case, 110 App. Div. 737; *affd.*, 185 N. Y. 544, it was said that "the children * * * get the one-fifth of the estate of their grandfather by his will and not by the will of their father.

In *Matter of Ripley*, 122 App. Div. 419, the original will gave the property to certain persons "unless otherwise disposed of" by a power of appointment given. It was held that the portion of the estate which was not "otherwise disposed of" went directly to said persons under the prior will and was not subject to the succession tax.

Upon examination of the two Warren wills, we find that under the original will the four children of George B., Jr., would take the estate equally if the power of appointment was not exercised. It was exercised so that, instead of an equal and immediate division of the estate among the four children upon the death of George B., Jr., the division was postponed during the life of his wife, who gets a life estate, and ultimately the absolute estate vested in three of the four children, the daughter receiving absolutely no part of the estate.

It is clear, then, that the petitioners do not and cannot take under the original will, but that their rights and estates are created and fixed by the power of appointment and that, therefore, they are required to pay a transfer tax upon such right of succession. In their application, the petitioners state that they elect to take under the original will and not under the power of appointment. This the petitioners could do, if the exercise of the power was a mere formality confirming the title previously acquired. *Matter of Lansing*, *supra*; *Matter of Ripley*, *supra*; but the exercise of the power, having worked a modification of the terms of the prior will and having created different estates and interests, cannot be ignored by the petitioners; and while compelled to take, if at all, under the power, they cannot elect to take under the original will for the purposes of this application.

An order may be entered denying the application.

Application denied.

Matter of the Probate of the Last Will and Testament of PATRICK B. O'REGAN, Deceased.

(Surrogate's Court, Kings County, March, 1909.)

WILLS—INTERPRETATION AND CONSTRUCTION—NATURE AND QUALITY OF ESTATES—TRUSTS OR INDIVIDUAL INTERESTS—TRUSTS IMPLIED—FROM PRECATORY WORDS.

Where testator gave the residue of his estate to his executors for their use and benefit, with a request to them that a portion thereof be used for masses for the repose of his soul and the balance to be given to some deserving charity, the prayer that the residue be devoted to the uses mentioned rests only upon the conscience of the legatees and does not impair the personal quality of their ownership.

Proceeding upon the probate of a will.

Anthony F. Tuozzo, for proponent; Michael A. O'Neill, special guardian.

KETCHAM, S.—In probate proceedings, construction is asked for the following clause of the will:

"XI. I give, devise and bequeath all the rest, residue and remainder of my estate of every nature and kind soever and wherever situated, unto my said Executors for their use and benefit. With a request to them, that a portion of said residue be used for Masses for the repose of my soul, and the balance given to some deserving charity."

The will appoints two nephews as executors.

This gift was to the persons who were named as executors, and has the same effect as if it were made to them *nominatim*.

It was not for them in their capacity as executors. Indeed, as such, strictly, they have no capacity to administer it, and no flavor of a trust outside of their executorship is found.

That the gift was to them personally appears in its limitation "to their use and benefit." The prayer that the residue shall be devoted to certain uses rests only upon the conscience of the legatees and does not impair the personal quality of their ownership.

This interpretation, so far as it can affect the personal property, should be expressed in the decree of probate.

Decreed accordingly.

NOTE ON BEQUESTS FOR MASSES.

IN OTHER JURISDICTIONS—HELD INVALID.

Gifts for masses or prayers for the souls of the departed, held invalid in England. *Heath v. Chapman*, 2 Drew. 417.

Likewise in Alabama, Kentucky and Wisconsin, mainly because of the lack of living beneficiaries. *Festorazzi v. St. Joseph's Church*, 104 Ala. 327; *Gass v. Wilhite*, 2 Dana (Ky.) 170; *McHugh v. Cole*, 97 Wis. 166.

Bequest for masses held void. Act of 43 Eliz., ch. 4.

A provision for saying prayers for the dead held to be a superstitious use, and therefore void. *Story, Eq. Jur.*, sec. 1164.

SAME—HELD VALID.

Where bequest is intended for the benefit of the testator himself, or of other persons named in the will, same held valid in New Hampshire, Illinois, Iowa, Kansas, Massachusetts, New Jersey, Pennsylvania and Rhode Island. *Webster v. Sugrow*, 69 N. H. 380; *Hoeffer v. Clogon*, 171 Ill. 462; *Moran v. Moran*, 104 Iowa, 216; *Harrison v. Brophy*, 59 Kan. 1; *In re Schouler*, 134 Mass. 426; *Kerrigan v. Tabb*, 30 Atl. 701; *Browers v. Fromm*, Add. (Pa.) 362; *Sherman v. Baker*, 20 R. I. 426.

IN NEW YORK—HELD INVALID.

Definite gifts for this purpose made valid by Laws of 1893, ch. 701, which see.

Bequest for benefit of the testator himself held valid, and the strict English doctrine of superstitious uses held inapplicable, as contrary to our free institutions. *In re Howard's Estate*, 5 Misc. 295.

No gift, grant, bequest or devise to religious, educational, charitable or benevolent uses, which shall, in other respects, be valid under the laws of this State shall (Be?) or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. Laws of 1893, ch. 701, sec. 1.

Foregoing provision of law is held to have made valid bequests for the purpose of providing masses for the repose of the souls of unnamed persons. See *Matter of Zimmerman*, 22 Misc. 411; *Matter of Backes*, 9 Misc. 504.

Where a testator bequeathed to his executor \$500 to be expended by him in having masses said for the repose of the soul of the testator, the bequest held void. *O'Conner v. Gifford*, 117 N. Y. 280.

A bequest to a priest for masses for the repose of testator's soul cannot be enforced until it is shown that the masses have been said. *In re Howard's Estate*, 5 Misc. 295.

Bequest to a priest, with letter of instructions to him as to using the will for masses, held invalid as contrary to the provisions of law forbidding perpetuities. *In re O'Hara*, 95 N. Y. 419.

Where one, with no intention of parting absolutely with the title and control of a fund, places it in the hands of another to be used by the latter, after the death of the former, to have masses said for the repose of his soul, no valid trust is created, and after his death, his executor or administrator may recover back so much of the fund as has not been expended in good faith pursuant to such direction. *Gilman v. McArdle*, 12 Abb. N. C. 414.

Moneys belonging to the wife of plaintiff's intestate were placed by her in the hands of defendant, with the direction and upon the condition that after the death of herself and her husband he should use the fund to have masses said by a Catholic priest for the repose of their souls, held, the trust could not be upheld; that there was only a naked deposit of money into the hands of the agent, and the death of the grantor intestate revokes the authority of the agent. *Gilman v. McArdle*, 65 How. Pr. 330.

See note appended to above case, setting out in full the opinion of Judge Tully in *Kehoe v. Kehoe*, in the Chancery Court of Cook county, Illinois.

IN NEW YORK—HELD VALID.

The efficacy of prayers for the dead is one of the doctrines of the Roman Catholic church, of which the testator was a member; and those professing that belief are entitled in law to the same respect and protection in their religious observances thereof as those of any other denomination. These observances cannot be condemned by any court, as matter of law, as superstitious, and the English statutes against superstitious uses can have no effect here. (Citing U. S. Constitution, First Amendment; N. Y. Constitution, Article I, Section 3), *Papallo, J., in Holland v. Alcock*, 108 N. Y. 328. *Holland v. Alcock* was held invalid on other grounds.

A direction in a will that the executors pay from the assets a sum of money for having masses said for the testator's soul is valid. *Matter of Hagenmeyer's Will*, 12 Abb. N. C. 432.

It seems that a trust for the same purpose or an absolute gift coupled with a request to use the fund for such a purpose would be valid. *Gilman v. McArdle*, 12 Abb. N. C. 414.

A bequest to a designated priest for masses does not create a trust, but is a gift to the priest for the purposes named, and is valid. *In re Howard's Estate*, 5 Misc. 295.

A bequest to the priest of a certain church for the saying of masses for the repose of testator's soul and the souls of her relatives and benefactors is not void for uncertainty as to beneficiaries, in view of Laws of 1893, ch. 701. In re Zimmerman, 22 Misc. 411.

The will of G. bequeathed his residuary estate, which consisted exclusively of personalty, to his executors, in trust, for the purposes expressed therein, as follows: "To be applied by them for the purpose of having prayers offered in a Roman Catholic church, to be by them selected, for the repose of my soul and the souls of my family, and also the souls of all others who may be in purgatory." Held, that the trust so attempted to be created was invalid; and that as to such residuary estate the testator died intestate, and the next of kin of the testator were entitled thereto, as there is no beneficiary in existence, or to come into existence, who is interested in or can demand the execution of the trust; that considering the trust is to pay over the fund to such Roman Catholic church as the executors might select (as to which, *quære*), the objection of indefiniteness in the beneficiary would not be removed.

It seems that under the English statute of chauntries and other statutes prohibiting superstitious uses in force at the time, the trust in question would not have been recognized in that country as valid as a charity.

It seems, also, that the trust in question may not be impeached on the ground that the use to which the fund was attempted to be devoted was a superstitious use, as the English statutes against superstitious uses have no effect here. (U. S. Const. Amendment, art. I.; State Const., art. I., par. 3.) *Holland v. Alcock*, 108 N. Y. 312.

There is a certain class of testamentary dispositions, the object of which is solely the benefit, real or supposed, of the testator, or the gratification of his desires, which, if trusts are not charities, nor do they have any beneficiary, yet, nevertheless, are unquestionably valid. The precise legal doctrine on which they rest, the cases do not state. I think a provision for masses for the benefit of the testator's soul is exactly akin to a provision for his funeral or a monument. While decent burial is given by law out of even an insolvent's estate, I think the monument is no more an adjunct or concomitant of burial than the masses. * * * I think all the directions are of the same general character and equally good in law. Cullen, J., in *Holland v. Alcock*, N. Y. Daily Register, Jan. 23, 1886.

Above opinion cited and approved in s. c., 40 Hun, 372.

A will directed the executor to cause masses to be read * * * for any balance of cash money which might be left after the payment of testator's just debts, doctor's bills, and funeral expenses. At the time the will was executed, testatrix had \$250 in money, but at the time of her death she had a larger sum. Held, that the executor would be directed to apply the sum of \$250, after deducting the debts and funeral expenses, for the reading of masses. *Matter of Backes*, 9 Misc. 504.

**Matter of the Administration of the Goods, Chattels and Credits
of JOHN STANLEY, Deceased.**

(Surrogate's Court, Kings County, March, 1909.)

**EXECUTORS AND ADMINISTRATORS—ACTIONS AND PROCEEDINGS IN GENERAL—
AUTHORITY, RIGHT AND DUTY—COMPROMISING ACTIONS—ACTIONS FOR
DEATH BY WRONGFUL ACT—EMPLOYMENT BY ADMINISTRATRIX OF DE-
FENDANT'S ATTORNEY; PROOF AS TO EXPEDIENCY OF PROPOSED SETTLE-
MENT.**

Where an administratrix, who has a right of action against a corporation for causing the decedent's death, has arranged with the corporation for a compromise of the claim, the attorney for the corporation may represent her in an application to the Surrogate's Court for an approval of the compromise; but upon such application there should be presented to the court something beside the views of the attorney as to the expediency of the proposed settlement.

Application by administratrix for leave to compromise right of action for damages for causing decedent's death.

Percy J. King, for petitioner.

KETCHAM, S.—The administratrix asks leave to compromise the right of action for damages against a company, in whose employ the decedent was, for the "wrongful act," neglect or "default" by which the decedent's death was caused.

Having first arranged with her for the proposed compromise, the company has provided the petitioner with the attorney representing her in this proceeding. The expense for his services will be borne by the said company.

The attorney makes affidavit that the amount of the settlement had been agreed upon before he was called in to perfect the legal details requisite to making the payment, and that he is of the opinion that it is to the interest of the estate and of the petitioner that she should be permitted to accept the compromise.

This attorney is only the agent of those who retain him and will pay him. He has assumed no duty toward his nominal client as to the terms of the compromise, and would be superhuman if he could sincerely serve her in that respect.

There is no legal reason why he may not represent her in this application, though he has no interest in her welfare; but his views as to the expediency of the proposed arrangement are as worthless to the court as they are to her.

There should be submitted the affidavit of the person or persons who have made the investigation upon which the applicant obviously depends in her submission of the facts.

There is no reason to doubt the fairness of the compromise. Indeed, upon the statement of the petitioner, it is generous to her; but the court must take care of this widow who has nobody to care for her, and the statement must be confirmed.

Decreed accordingly.

Matter of the Application of GEORGE DENYSE and ELLA I. DENYSE, for the Revocation of Letters Testamentary Granted to MARY HEIST, as Executrix of the Last Will and Testament of PHILIP HEIST, Deceased.

(Surrogate's Court, Kings County, March, 1909.)

INFANTS—DISABILITIES IN GENERAL—CAPACITY TO INSTITUTE LEGAL PROCEEDINGS.

SURROGATES' COURTS—PROCEDURE AND REVIEW—PETITIONS—PARTIES—INFANT JOINED WITH ADULT.

Where proceedings have been commenced, to revoke letters testamentary granted to an executor, by the joint petition of an infant legatee and her father who is also a legatee, but for a nominal amount, the petition will not be dismissed on the ground that one of the petitioners is, by reason of infancy, incapable of maintaining the proceeding.

Proceeding to revoke letters testamentary.

Henry M. Dater, for petitioners; David M. Neuberger, for executrix, respondent; Edward J. Fanning, special guardian.

KETCHAM, S.—Proceedings to revoke letters testamentary have been commenced by joint petition of an infant legatee and her father, who is also a legatee, but for a nominal amount.

The infant has no guardian, general or special, and makes her petition in her own name and behalf.

The motion to dismiss the petition, on the ground that one of the petitioners is by reason of infancy incapable of maintaining it, must be denied.

The questions presented by the motion were laid by Surrogate Coffin, in 1884 (*Matter of Watson*, 2 Dem. 642), and his views there expressed have remained without dissent.

Let order be settled providing for the filing and service of answer, and setting the case for trial.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of HERMAN BARUTH and ISAAC LUBLIN, as Executors of the Last Will and Testament of THERESA KETCHAM, Deceased.

(Surrogate's Court, Kings County, March, 1909.)

EXECUTORS AND ADMINISTRATORS: RIGHTS AND LIABILITIES BETWEEN REPRESENTATIVE AND ESTATE—ITEMS CHARGED OR CREDITED—PAYMENTS ON COMPROMISE OF CLAIM: ACTIONS AND PROCEEDINGS IN GENERAL—AUTHORITY, RIGHT AND DUTY—COMPROMISING ACTIONS.

Executors should be credited with a sum paid by them in compromise of an action against them on a claim said to have accrued against their decedent, although the claim should afterward be shown to have had no foundation, if they made the settlement in good faith and from a reasonable fear that the litigation for the enforcement of the claim might go against them, or that their success might prove more costly to the estate than a partial surrender.

Proceedings for the judicial settlement of the accounts of executors.

Hirsh & Rasquin (Hugo Hirsh, of counsel), for executors; Hugo Wintner, for contestant, Philip Ketchum; Ralph K. Jacobs, for Annie Jacobs.

KETCHAM, S.—Objection is made that the executors' account should not be credited with the sum paid in compromise of an action against them on a claim said to have accrued against their decedent.

A determination that the executors were not liable in that action would not sustain the objection. Even if the cause of action which the executors have settled were now shown to have had no foundation, they should be allowed credit for the payment, if it was made in good faith and from a reasonable fear that the litigation might go against them or that their success therein might prove more costly than a partial surrender.

Without an attempt to answer the close questions which surround this claim, it should be held that the executors did wisely and faithfully in purchasing peace for the estate.

True, the alleged creditor, as a part of the compromise, gave to the executors his bond to indemnify them against liability if any should occur by reason of objections such as are now filed. But the quality of the objection remains the same as if no bond had been given. It still presents only the question whether the claim was fraudulently or negligently compounded.

The objection is overruled.

Objection overruled.

Matter of the Judicial Settlement of the Account of SAMUEL H. COOMBS et al., as Executors and Trustees under the Last Will and Testament of ROBERT W. GLEASON, Deceased.

(Surrogate's Court, Kings County, March, 1909.)

**LIFE ESTATES—LIABILITIES AS BETWEEN LIFE TENANTS AND REMAINDERMEN
—RIGHT IN GENERAL—CARRYING UNPRODUCTIVE PROPERTY.**

The charges for carrying unimproved and unproductive property withheld by testamentary trustees from the market for the eventual benefit of the remainder, where the trustees have acted in the exercise of a sound discretion and the property has appreciated in value sufficiently to justify their management, should be charged upon the fund and not upon the income of the life tenant.

Proceedings upon the judicial settlement of the accounts of executors.

Robert H. Wilson, for executors; Eugene L. Richards, special guardian.

KETCHAM, S.—The trustees are right in imposing upon the fund, and not the income, the carrying charges of the unimproved and unproductive property which they have withheld from market for the eventual benefit of the remainder. Matter of Martens, 16 Misc. Rep. 245; see also opinion of Mr. Surrogate Belford, in Matter of Knapp, filed April 13, 1908.

These trustees have acted in the exercise of a sound discretion, and the lands above mentioned have all appreciated in value sufficiently to justify their management.

As to the Atlantic avenue lots, there is no evidence as to their improvement in value, and while in five years the disbursements have been \$210.11, the rent for the last year has been fifty dollars. Upon the evidence, no reason is perceived for laying the burden of any part of these outlays upon the life tenant.

With the exception last noted, the objections are overruled.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of WILLIAM CASHMAN, as Administrator of MARY A. SHEPARD, Deceased.

(Surrogate's Court, Kings County, March, 1909.)

EXECUTORS AND ADMINISTRATORS—DEBTS OF ESTATE—ENFORCEMENT OF CLAIMS—SHORT STATUTES OF LIMITATION—EFFECT OF CLAIMANT'S INFANCY.

Where an infant has exhibited to an administrator a claim against the estate of a decedent, and the administrator has disputed and rejected it, and no written consent has been filed for the determination of the claim by the surrogate, and no action has been commenced for the enforcement of the claim against the administrator within six months after the rejection, the running of the short statute of limitations is suspended during the period of the infancy of the claimant.

Proceeding upon judicial settlement of the account of an administrator.

Edmund Bittiner, for administrator; Thomas H. Troy, special guardian for Edward Jordan and George J. Jordan, infants; Jose E. Pidgeon, special guardian for Mollie Goldstein, infant.

KETCHAM, S.—A person still an infant has exhibited to the administrator a claim against the estate of the decedent. The administrator has disputed and rejected the claim. No written consent has been filed with the surrogate for the determination of the claim, and the infant claimant has not commenced an action for the recovery thereof against the administrator within six months after the dispute or rejection.

It is insisted on one side that the claim is barred by section 1822 of the Code; and, on the other, that the special limitation contained in that section is subject to the provision of the general Statute of Limitations (Code, § 396), that the period of

infancy is not a part of the time limited for commencing the action.

The latter view must prevail, notwithstanding the mischiefs which may follow, and they are serious. The case seems to be controlled by *McKnight v. City of New York*, 186 N. Y. 35, in which, as to a short Statute of Limitations, bearing the same relation to the general statute as does section 1822 of the Code, it is held that the special limitation is "left like the general limitation prescribed in chapter 4 of the Code of Civil Procedure, subject to suspension during the existence of any of the disabilities specified in section 396, one of which is infancy.

There remain further grounds upon which the court is asked to make a decree of distribution, in disregard of this claim, but they all present matters of fact which can only be disposed of upon a trial.

Decreed accordingly.

**Matter of the Judicial Settlement of the Account of GEORGE
HOFFMAN, as Administrator of JULIA HUF, Deceased.**

(Surrogate's Court, New York County, March, 1909.)

EXECUTORS AND ADMINISTRATORS—RIGHTS AND LIABILITIES BETWEEN REPRESENTATIVE AND ESTATE—ALLOWANCES—COUNSEL FEES—NECESSARY OR PROPER ITEMS—EXPENSES OF LITIGATION—BEYOND POINT FOR REASONABLE TERMINATION.

Credit for expenses of litigation can be allowed an administrator where such expenses are necessary and for a reasonable amount, and litigation is to be treated as necessary when it has been prosecuted not only in good faith but also in the exercise of a reasonable judgment.

Where an administrator brings an action against a savings bank to recover moneys deposited by his intestate and the bank defends upon the ground that the entire deposit has been paid to one acting under a power of attorney executed by the decedent in her lifetime, and that the attorney had a personal interest in the deposit of such a character as rendered the payment valid though made after the death of the decedent; and upon the trial the evidence of the attorney as to the

transactions between himself and the decedent were excluded, on the ground that he was incompetent as a witness under section 829 of the Code of Civil Procedure, and judgment was rendered in favor of the plaintiff, but on appeal to the Appellate Division it was held that the attorney was a competent witness, and the judgment was reversed and a new trial ordered; and where upon a second trial the testimony of the witness was admitted and the jury found a verdict for the defendant but the judgment was reversed by the Appellate Division on an appeal therefrom because of the improbability of the testimony of the witness who was uncorroborated; and where on a third trial the jury again found for the defendant and the court denied a motion for a new trial, the administrator, in the exercise of a proper discretion, should then have stopped the litigation; and where, if the administrator had then stopped, he might have paid the debts of the estate out of the assets in his hands, further appeals to the Appellate Division and to the Court of Appeals were not within the exercise of a reasonable discretion, where they resulted in depleting the assets which were originally \$3,164, so that but \$405.88 remained which was inadequate for the payment of the decedent's debts.

Reversed 136 App. Div. 516.

Proceeding upon the judicial settlement of the account of an administrator.

I. Balch Louis, for administrator; Albert F. Gescheidt and Jeremiah D. Loomney, for heirs at law; Ritch, Woodford, Bovee & Butcher, attorneys for contestant.

THOMAS, S.—The administrator is a resident of Philadelphia, and he intrusted all the matters in the administration of this estate to his attorney in this proceeding. The account filed discloses that receipts amounting to \$3,164 have been consumed in the expenses of various litigations, except that a balance of \$405.88 remains to be distributed to those entitled thereto, subject to the deduction of the commissions of the administrator and the expenses of this accounting. The debts of the estate, being judgments for costs recovered against the administrator in some of the litigations, and aggregating \$1,387, besides interest, are unpaid. Objections are filed by the judgment creditors and certain of the next of kin.

Credit claimed for expenses of litigation can be allowed when such expenses were "necessary," and then for a reasonable amount (Code Civ. Pro., § 2730), and a litigation can be treated as necessary when it has been prosecuted, not only in good faith, but also in the exercise of a reasonable judgment. *Matter of Huntley*, 13 Misc. Rep. 375; *Matter of Stanton*, 41 id. 278; *St. John v. McKee*, 2 Dem. 236; *Estate of Peyser*, 5 N. Y. St. Repr. 334. I am of opinion that the third appeal to the Appellate Division of the Supreme Court in the *Union Dime Savings Institution* case, and the further appeal from the judgment of affirmance rendered thereon to the Court of Appeals, when it was finally affirmed, should not, under the rule as I have stated it, be approved. This action against the *Union Dime Savings Institution* was defended upon the ground that the entire deposit had been paid to one *George Thoma* under a power of attorney executed by the decedent in her lifetime, and it was alleged that *George Thoma* had a personal interest in the deposit of such a character as rendered the payment valid though made after the death of the decedent. Upon the first trial of that action, had before a justice of the Supreme Court without a jury, the evidence of *George Thoma* as to the transactions between himself and the decedent was excluded, it being determined that he was not a competent witness under section 829, Code of Civil Procedure, and judgment was rendered in favor of the plaintiff. On appeal the Appellate Division decided that *George Thoma* was a competent witness, and that his evidence should have been received, and the first judgment was, therefore, reversed and a new trial ordered. Notwithstanding this conclusion the court commented upon the evidence in the case, and quite clearly expressed an opinion in hostility to the defendant's contentions in a way likely to caution the justice presiding at the second trial about to be had against being misled into showing any favor to the evidence then pronounced to be admissible. *Hoffman v. Union Dime Savings Inst.*, 95 App. Div. 329. The second trial

was had before a justice of the Supreme Court and a jury; Mr. Thoma testified, and a verdict was rendered in favor of the defendant. The substance of Mr. Thoma's evidence was that the bank book had been delivered to him by the decedent and the fund then given to him by parol, he to have all that remained after caring for the decedent during her life and paying the expenses of an appropriate funeral for her after her death. The sole question litigated was one of fact, pure and simple; if Mr. Thoma was believed the defense of the bank was perfect. Both sides were fully heard and various matters were urged to attack the story of Mr. Thoma as improbable or to show him unworthy of belief because of interest or otherwise, and evidence in corroboration of his testimony was also given. On appeal from this judgment the justices of the Appellate Division were plainly of the opinion that the verdict was erroneous, the conclusion being as follows: "But even if the technical requisites of a gift had been proved, the evidence is so unsatisfactory and Thoma's testimony so contradictory and apparently unreliable that justice requires there should be another trial, and for that reason the motion for a new trial should have been granted." 109 App. Div. 24, 27. The judgment was reversed. Following this action of the Appellate Division, and in the light of the opinion then written, the third trial was had before another justice of the Supreme Court and a jury, upon which all the evidence obtainable on both sides of the controversy to this single issue of fact was again threshed out and another verdict was rendered for the defendant and a new trial was denied.

At this point the plaintiff should, in my judgment, have rested and accepted his defeat as final. Twice had the Appellate Division expressed its opinion that Thoma's story was incredible and his evidence unworthy of belief, and two different juries had, notwithstanding those opinions, unanimously agreed that Thoma had told the truth. The third trial was conducted with great fairness, and no occasion for criticism was found upon the appeal that was taken worthy of any comment whatever, and,

as I have above said, the issue presented was one of fact, and that alone. The jury had a right to believe Thoma, and no court could by its direction require them to make a finding contrary to that evidence. To direct one new trial when it is believed that the weight of evidence requires a different result is not unusual, but it is not the practice of appellate courts to keep on ordering new trials against repeated verdicts, and counsel for the administrator, in the exercise of a reasonable judgment, should have known that fact. A reversal of the judgment would not have availed him unless he could have had a fourth jury to render a unanimous verdict that each and every of the jurors that had previously tried the case had been mistaken. An aggrieved litigant, dealing with his own funds and at his own expense, may sacrifice his own money in support of his own pride of opinion, but the persistent course of litigation adopted here, by an administrator dealing with the funds of others, can be excused only by success, and when the appeal came to the Appellate Division the affirmance of the judgment was not accompanied by any expression of opinion.

The further appeal to the Court of Appeals was equally ill advised, since that court could hardly be expected under the circumstances to reverse a judgment as to facts which had been so thoroughly litigated in the court below. The question of the competency of Mr. Thoma as a witness under section 829, Code of Civil Procedure, might have been debated in that court if the question had been worthy of serious argument, but in a brief of forty-eight pages presented to that court by the appellant there is only one point upon this subject, and it contains only eight lines of printed comment. This, in my judgment, was fully as much as the question deserved, for Mr. Thoma was not a party to the record, he had no direct interest in the result, and the defendant did not acquire a right to the fund in controversy from, through or under him. At any rate, the affirmance in the Court of Appeals was also without opinion.

When the administrator took this third appeal he had funds in his hands wherewith to pay all debts of the estate, including the judgments for costs previously obtained against him. The expenses of the subsequent litigation made the estate insolvent and rendered the judgments for costs uncollectible, except from the sureties on the undertakings on appeal. The administrator and his attorney should have known that just this result would follow unless they could finally prevail; it was the money of the judgment creditor they so recklessly put to hazard, and they should not be permitted upon light grounds to take from the fund for their own indemnity the means for satisfying the just claim of their adversary.

In further criticism of the lack of prudence with which this litigation was conducted, it appeared that the administrator in March, 1903, in an action for money had and received commenced by him in the Supreme Court, recovered by default and procured to be entered against Thoma a judgment for the sums of money collected by him from savings banks, upon which judgment an execution against the body of the defendant was issued, under which he was imprisoned and held in confinement until released under a proceeding had in the Supreme Court. The effect of the entry of this judgment was to destroy the remedy of the Union Dime Savings Institution over against Thoma in case of a recovery against it for an unauthorized payment to Thoma, and as a consequence of this first proposition it operated as a complete bar and defense to the action of the administrator against it. So complete and perfect was this defense that the action would have been dismissed on motion if such motion had been made upon either the second or the third trial upon the fact of the entry of the judgment being shown. *Fowler v. Bowery Savings Bank*, 113 N. Y. 450. This decision of the Court of Appeals was rendered in 1889. It ought to have been known to the counsel for the administrator when the judgment was entered against Thoma in 1903, and at all subsequent times. It was negligence in him not to know what the law was on this sub-

ject, but in view of the fact that his eminent and successful adversaries appear also to have overlooked the point, I am unwilling to place my decision solely on this ground or to refuse credit for the disbursements up to and including the third trial.

The finding and report of the learned referee will be modified by disallowing \$250 of the counsel fee allowed by him, and \$389.84, the disbursements of the two appeals from the judgment rendered on the third trial, and the account will also be surcharged with the judgments for costs recovered against him on said appeals, amounting to \$307.14, together with the interest thereon.

The contentions of the objectants relative to the management by the attorney for the administrator of the foreclosure suit and the loss of the judgment owing to the estate cannot prevail. The administrator was not obligated to bid at the foreclosure sale when he was without funds to do so, and I cannot charge him with notice that his account would be disapproved so as to leave any part of the estate in his hands. The referee has not found the facts of this matter, and he was not duly requested to make any findings with relation thereto. The exception to his "refusal" to make such findings is, therefore, not a suitable foundation upon which to make a decision in reversal of his action. In all other respects the report of the referee is confirmed. The administrator will be awarded commissions, but he will be charged personally with the costs and disbursements of the contest.

Decreed accordingly.

Matter of the Estate of MINNIE TIMS, Deceased.

(Surrogate's Court, Yates County, April, 1909.)

WILLS—INTERPRETATION AND CONSTRUCTION—TERMS DEFINING THE NATURE AND QUALITY OF ESTATES OR INTERESTS—FUTURE INTERESTS AND VESTING, POSSESSION AND ENJOYMENT—DIRECTIONS FOR A DIVISION.

Where a testator in different clauses of his will gives a life estate in his real and personal property, respectively, to the same persons with remainder over in each case to the same persons, which remainders are to become vested in possession at the same instant, but an application of strict rules of construction to each clause separately would determine that, while the remainders in the real estate would vest in interest at the death of the testator, the remainders in the personal property would not vest in interest until the death of the primary legatees and would result in an intestacy as to one-third of the residue of the personal estate; and where the will further provides that, in the event of the death of said remaindermen "before the legacies hereinbefore bequeathed or devised to them become vested in them or before the time appointed for the distribution of the residue of my personal estate, the legacies or distributive shares or both of the one or ones so dying shall not lapse but shall pass to their children then surviving in equal shares," the legacies and remainder of the personal estate vested upon the death of the testator, and, upon the death of one of said remaindermen, intestate, passed to his only surviving child as primary legatee under testator's will and were subject to the transfer tax as part of her estate.

Appeal from an order assessing and fixing the transfer tax.

M. A. Leary, for appellant, Mary S. Ketcham, as administratrix; John T. Knox, for respondent, State Comptroller.

BAKER, S.—An order was made by this court, January 16, 1909, upon reading the report of the appraiser determining the value of the property which was transferred by the death of the decedent intestate and the amount of tax upon such transfer.

A notice of appeal from such order by Mary S. Ketcham, as administratrix, was filed January 21, 1909, stating as the

grounds of appeal that "the appraisal and assessment were made on property not owned by Minnie Tims at the time of her death, which property is alleged to have been received by her under the Eighth and Ninth clauses of the Will of William Whitwell, late of Geneva, Ontario County, New York."

The issue made by this notice of appeal is the single question whether William Whitwell expressed in his will an intention that the legacy in remainder to James Tims should vest upon the death of the testator, or should be contingent upon the survivorship of James Tims, or his children, to the time of distribution.

If it is a vested remainder, it was transferred by the death of Minnie Tims, the only child of James Tims, intestate, to her next of kin and is a taxable transfer; if it is a contingent remainder, it has lapsed and there has been no transfer.

The will of William Whitwell contains the following provisions:

The first six clauses provide for the payment of debts, etc., and for certain specific legacies and devises.

"Seventh. I give and bequeath unto my nieces Hannah Forden and Cornelia Tims, the use of all the rest, residue and remainder of the real estate of which I shall die seized for and during the term of their joint lives, and for and during the lifetime of the survivor of them, and subject to said life estate therein of Hannah Forden and Cornelia Tims and of the survivor of them, I give devise and bequeath the said rest, residue and remainder of the real estate of which I shall die seized unto my nephews William Whitwell and James Tims, and unto my niece Cornelia A. Robinson in equal shares to them, their heirs and assigns forever.

"Eighth. All the rest, residue and remainder of the personal estate of which I shall die seized, I give and bequeath unto George A. Forden and Cornelia Tims in trust, however, to invest the same in such securities and investments as to them

shall seem best and to keep the same so invested for and during the joint lives of my nieces Hannah Forden and Cornelia Tims, and for and during the lifetime of the survivor of them, and meanwhile to collect and receive the net income, issues and profits arising therefrom and to pay over the income derived therefrom unto my nieces Hannah Forden and Cornelia Tims in equal shares for and during their joint lives and at the death of either of my said nieces to pay the whole of said net income to the survivor for and during the term of her natural life, and, at the termination of the last of said life estates, to divide the said remainder of my personal estate equally between my nephews James Tims and William Whitwell, and my niece Cornelia A. Robinson.

"Ninth. In the event of the death of James Tims, William Whitwell and Cornelia A. Robinson before the legacies hereinbefore bequeathed or devised to them become vested in them or before the time appointed for the distribution of the residue of my personal estate, the legacies or distributive shares or both of the one or ones so dying shall not lapse but shall pass to their children then surviving in equal shares."

William Whitwell, the testator died March 27, 1899.

James Tims died, intestate, August 27, 1899, leaving but one child, Minnie Tims, who died, intestate, July 19, 1908, and was fifty years of age at the time of her death.

Hannah Forden, one of the two primary beneficiaries under the seventh and eighth clauses of the will, survives, and was sixty-five years of age at the death of Minnie Tims.

It must be conceded that, if the only evidence we have of the intention of the testator is that contained in the eighth clause of the will, the bequest in remainder therein to James Tims would, upon a strict application of the rules of construction, lapse in the event of his death prior to that of the primary legatees; for it is a bequest of a future interest, not directly to James Tims, but indirectly, through the exercise of powers con-

ferred upon trustees; and survivorship to the time of distribution is an essential condition to the acquisition of an interest in the subject of a gift so bequeathed. *Warner v. Durant*, 76 N. Y. 133; *Matter of Baer*, 147 id. 348.

This rule, however, has many exceptions and is seldom alone relied upon (*Clark v. Cammann*, 160 N. Y. 317-327) and is always subordinate to the primary rule of construction, that the construction shall follow the intent to be collected from the whole will, and that the intention of the testator so ascertained must prevail, and that general rules of construction must give way, when, on a consideration of the general scheme of the will, or of special clauses or provisions, their application would in particular cases defeat the intention. *Goebel v. Wolf*, 113 N. Y. 405; *Matter of Embree*, 9 App. Div. 602; *affd.* 154 N. Y. 778.

By the seventh clause of his will, the testator devises "all the rest, residue and remainder" of his real property to Hannah Forden and Cornelia Tims during their lives, with a vested remainder over to William Whitwell, James Tims and Cornelia A. Robinson.

By the eighth clause of his will the testator bequeaths "all the rest, residue and remainder" of his personal property to trustees, they to pay the income therefrom to the same primary beneficiaries named in the seventh clause, with a remainder over to the same remaindermen named in the seventh clause, which last remainder unexplained would be a contingent remainder.

In other words, the testator in different clauses of his will gives a life estate in his real and personal property to the same persons, with remainder over to the same persons, which remainders are to become vested in possession at the same instant; but an application of the strict rules of construction to each clause, separately, would determine that, while the remainder in the real estate would vest in interest at the death of the testa-

tor, the remainder in the personal property would not vest in interest until the death of the primary legatees, for the reason that the remainder in the real property is given directly to the remainderman, and the remainder in the personalty is given indirectly, through trustees, with instructions to "divide."

If this was the intention of the testator, upon the death of James Tims or either of the remaindermen before the time for distribution, he would have died intestate as to one-third of the \$75,000 residue of his personal property.

Was this the intention of the testator? Or was it his intention that James Tims should have like interests in the real and personal estates; and did the testator create the trust, not for the purpose of vesting in the trustees the remainder of the personal estate and thereby defeating a vested right in the remaindermen, but for the purpose of securing the preservation of so large an estate and the payment of the income, so creating a power in trust rather than a title in trust, as was held to be the intention of the will under consideration in *Steinway v. Steinway*, 163 N. Y. 183, and for the convenience of the estate, as was held to be the intention in *Matter of Embree*, *supra*?

I believe the answer is found in the ninth clause of the will; for there the testator provides, in substance, that the legacy bequeathed (eighth clause) or devised (seventh clause) shall not lapse in the event of the death of James Tims before they become vested in him, or before the time appointed for the distribution of the corpus of the personal property, but shall *pass* to his surviving children; and it indicates that the testator was thoughtful lest, in establishing a trusteeship for the convenience of the personal estate, his intention, that James Tims and the others should take a vested estate in the remainder, might be defeated; and so he adds this ninth clause and attempts to provide for the only possible contingency which could defeat the vesting of the remainder.

It is significant that the testator directs that the legacies, or

distributive shares, or *both*, shall *pass* to the children, instead of using the language of the eighth clause and directing the trustees to *divide* the distributive shares among the children.

The ninth clause clearly refers both to the bequest in remainder given in the eighth clause of the will and to the devise in remainder given in the seventh clause, and I believe, expresses the intention that the personal and real estate in remainder shall be given to the same persons, flow through the same channels and vest in interest at the same time.

He speaks of the death of James Tims and others before the time of vesting, or before the time of distribution, as though they would be different periods.

If it was the intention of the testator that the remainder should vest at a period other than the time of distribution, it must follow that it was his intention that the estates in remainder would become vested interests at his death.

The words "but shall pass to their surviving children in equal shares" are not words of limitation; they do not refer to the quality of the estate given, but they multiply the persons in whom the estates may vest, and give emphasis to the intention of the testator that the gifts shall not lapse, but pass to the surviving children, as primary legatees and devisees in remainder, and not as representatives by way of substitution; for the children were to take, even if their parent died before the testator. *Matter of Barker*, 45 Hun, 294; *affd.* 113 N. Y. 366 (opinion more fully stated in *Thompson Estates*, 1450); *Clark v. Goodridge*, 51 Misc. Rep. 140; *Smith v. Edwards*, 88 N. Y. 92; *Matter of Dillon*, 60 Misc. Rep. 636.

It is the "legacies or distributive shares" of the ones dying which the testator says shall "pass," as though the ones so dying were to be possessed of and own such legacies or shares before the period of distribution; and the trustees were not to take a title, but a power in trust, as the trustees took in *Steinway v. Steinway*, *supra*.

Having reached the conclusion that Minnie Tims was a primary legatee in remainder, my conclusion that the will expresses the intention of the testator that such legacy should be a vested right is further supported by the rule laid down in *Matter of Brown*, 154 N. Y. 313.

In that case, the trustees at the termination of the life estate were directed to equally divide the corpus of the estate between the children of the testator's two daughters, one-half to the children of each.

The Court of Appeals, in subsequently discussing this case in *Clark v. Cammann*, 160 N. Y. 315, said: "It will be observed in that case (*Matter of Brown*) there were no words of survivorship used with reference to the grandchildren, such as their descendants, or, such as then survive; which were important considerations in determining the meaning of that will and induced us to hold that under the statute, the estate vested in the grandchildren, they all being alive at the death of the testator, and having an immediate right of possession upon the determination of the life estate.

"In the will we now have under consideration (*Clark v. Cammann*), the provision materially differs. 'And from and immediately after her decease, upon trust, to pay over and divide said principal sum of \$10,000 unto and among all her children, share and share alike.'

"Had the testator stopped here, we would have regarded this will to be in substance the same as in the *Brown* case, and should not have hesitated to hold that the legacies vested in the sons; but the testator proceeds—'and to their lawful representatives forever, as tenants in common, per capita,' etc."

It will be observed that the testator in the will under consideration does not say that, in the event of the death of the legatees in remainder before the time for distribution, the legacies shall pass to the children surviving at the time of distribution, but to the children surviving the death of the legatee.

He makes no provision for a distribution of the estate in remainder in the event of the death of any of the children of his nephew or nieces after the death of their parents and before the time of distribution, although it appears that Minnie Tims, the only child of James Tims, was but fifteen years younger than Hannah Forden, one of the primary legatees, and was upward of forty years of age at the death of the testator.

It would have been very natural for the testator to have so provided, if it was his intention that only the children surviving to the time of division should participate in the division. *Goebel v. Wolf*, supra.

This will is distinguished from that in *Matter of Baer*, supra, for the provision there was that the remainder be conveyed "to the children *and lawful heirs of my brother*." Here the remainder is to pass to the children only of James Tims and not to any other of his heirs.

It is apparent that it was the contemplation of the testator that the estates in remainder should vest, subject to the life estates created by him at the time of his death, either in his nieces or nephews, or, in the event of the death of either of them before his death or before the time of distribution, in their children then surviving as primary legatees in remainder; that, when his testamentary labors were ended, he believed that the distribution of his estate had been provided for; that the legacy to James Tims would not lapse in the event of his death, or that of his children, but would pass on through the channel in which he had directed it and would not, in any event, be diverted from that channel to wander uncertainly through the intestate laws, back through himself, to his unknown next of kin; that no construction of his will would sustain a conclusion that he died intestate as to the \$75,000 of his property, and that such an intent could not be implied as to his will by the happening of any subsequent events, or by the application of a technical rule of construction.

At the testator's death there was no contingency in this legacy.

Neither the persons to whom, nor the event upon which their estate was limited, was uncertain; the legacy in remainder was, therefore, both under the rules referred to as well as under the statute, a vested and not a contingent estate.

A remainder is not to be construed as contingent in any case where it may be vested consistently with the intention of the testator. *Embury v. Sheldon*, 68 N. Y. 227-236.

The rule is well settled that a *very clear* intention must be indicated to postpone the vesting under a residuary bequest, if intestacy is to result, or such may be its effect. *Miller v. Von Schwarzenstein*, 51 App. Div. 18.

The law favors such a construction of a will as will avoid disinheritance of remaindermen who may happen to die before the termination of a precedent estate. *Connolly v. O'Brien*, 166 N. Y. 406.

The order appealed from should be affirmed.

Order affirmed.

**Matter of the Appraisal of the Estate of MARIA B. STARBUCK,
Under the Acts Relative to Taxable Transfers of Property.***

(*Surrogate's Court, Westchester County, April, 1909.*)

**TAXES—INHERITANCE AND TRANSFER TAXES—ASSESSMENT—APPRAISAL—
DEDUCTION OF VALUE OF ESTATE BY CURTESY.**

Where a wife dies intestate her husband's right of curtesy in her real estate should be deducted from the amount of her estate before fixing the transfer tax thereon.

Affirmed 137 App. Div. 243.

Appeal from an order confirming the report of the transfer tax appraiser.

J. Mortimer Bell, for appellant and administrator; John J. Sinnott, for State Comptroller.

* See note on Curtesy, p. 265.

MILLARD, S.—This is an appeal from an order confirming a report of the transfer tax appraiser and fixing the transfer tax on the estate of Maria B. Starbuck, deceased. The only question to be decided by me is whether or not the value of the husband's right of curtesy in the undisposed of real estate of his wife should be deducted from the amount of the estate left by her before fixing the tax, or whether it shall be taxed as a part thereof. It is admitted that the appellant, G. Fred Starbuck, was the husband of Maria B. Starbuck, deceased; that she died seized of certain real property in the city of Mt. Vernon; that children were born alive of the marriage and that the said Maria B. Starbuck is now dead. There can, therefore, be no question in this case that all of the requisites necessary to give the husband the right of curtesy existed. That he has such a right has not been disputed by the appraiser, and is admitted in the Comptroller's brief. It is a cause of great surprise to me, to say the least, to find, at this late date, that no decision upon this subject has ever been rendered and that the question is to be decided by me apparently for the first time. Burrill's Law Dictionary, volume 1, page 412, referring to curtesy, says it is: "An estate to which a man is by law entitled, on the death of his wife, in the lands or tenements of which she was seized during the marriage in fee simple or fee tail, provided he had issue by her, born alive, during the marriage, and capable of inheriting her estate."

It further says: "It is a species of freehold estate, and not an inheritance, and equally known to English, Scotch and American law." Citing 4 Kent Com. 27, 28.

Prior to the Married Women's Acts of 1848, 1849 and 1861, the husband had the absolute right to the wife's property during his life; but, after the passage of these acts, the wife had the right to sell and dispose of her property the same as if she was a *feme sole*. By the provisions of these acts, therefore, the wife had the right to cut off and defeat the husband's right of

curtesy, either by will or deed, if she saw fit to do so; in other words, the husband's right of curtesy still existed, subject, however, to the right of the wife to divest him of it by will or deed.

"The husband's estate is not derived merely out of the estate of the wife, but is created by law, and is tacitly annexed to the gift, and so continues as an incident of the estate created, notwithstanding the termination thereof by the happening of the specified event." *Hatfield v. Sneden*, 54 N. Y. 280.

"The common law rights of a husband as tenant by the curtesy are not affected by the Acts of 1848 and 1849, for the more effectual protection of the property of married women, as to the real estate of the wife undisposed of at her death." *Hatfield v. Sneden*, 54 N. Y. 280.

This seems to be the only authority upon this question, but it has never been criticised or disputed in any way; and the conclusion is inevitable that, if the right of curtesy was not affected by the acts above referred to, it must still exist, as it did originally. The Married Women's Acts above referred to were repealed by chapter 272 of the Laws of 1896, known as the Domestic Relations Law; and the provisions of those acts are now embodied in section 20 of said Domestic Relations Law. In addition to the case of *Hatfield v. Sneden*, above referred to, which holds that the husband's estate of curtesy is not derived out of the estate of the wife, but is created by law, I might in this connection call attention to the fact that the general rule of descent of real property in this State makes no reference whatever to the right of curtesy, but disposes of the real estate of an intestate as follows:

"Section 281. General Rule of Descent. Real property of a person who dies without devising the same shall descend:

- "1. To his lineal descendants.
- "2. To his father.
- "3. To his mother; and

"4. To his collateral relatives, as prescribed in the following sections of this Article."

The right of curtesy, however, is recognized in this same Real Property Law (chapter 547 of the Laws of 1896), and at the end of section 280 the following provision will be found: "this Article does not affect a limitation of an estate by deed or will, or tenancy by the curtesy or dower."

It must be evident that, if the right of curtesy was an inheritance, it would be provided for in section 281 above set forth; but no mention whatever is made, and it would, therefore, be otherwise disposed of, were it not for the common law right which is still recognized by the above quotation from section 280. Section 220 of chapter 908 of the Laws of 1906, provides as follows:

"Taxable transfers. A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of \$500 or over or of any interest therein or income therefrom in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property in the following cases:

"1. When the transfer is by will or by the intestate laws of this State from any person dying seized or possessed of the property while a resident of the State."

There are other provisions of this section, but all of them refer, except in the case of a transfer made during the lifetime of a person, to a transfer by will or the intestate laws of the State; and, as above shown, the husband's right of curtesy is not acquired by him by will, or by reason of the intestate laws, but is a common law right which during the lifetime of his wife was initiate, but which after her death became consummate, and his right to the same could not have been questioned from the time that his wife was seized of the property and their children were born alive, unless the wife saw fit to dispose of the same by will or deed. In this case, having failed to do

either, the husband's right to the same dates back to the time when these conditions existed, and, although his right to possession, owing to her right to divest him if she saw fit, must be postponed until her death, still it nevertheless existed and could be taken away in no other way. The Court of Appeals, in *Matter of Gould*, 156 N. Y. 423, have thus defined the meaning of the word "transfer:" "The word 'transfer' in the act in relation to taxable transfer of property is used in its ordinary legal signification, namely, that the owner of a thing delivers it to another with the intent of passing the rights which he has in it to the latter." It is quite evident from this definition that no transfer was made by the wife of the right of curtesy claimed by the husband in this case.

There is only one other point raised in this case which I consider necessary to pass upon at this time. It is claimed by the respondent that, in order to entitle the appellant to relief, he must show that the property claimed to be exempt is specifically made so by statute. I think he is wrong in this statement. This would be so in reference to a general tax law, but the collateral inheritance tax is looked upon as a special tax, reaching only special cases and affecting only special classes of persons. The decisions submitted by the respondent, read with this distinction in view, will show that he is wrong in applying them to this case.

The Court of Appeals, in *Matter of Enston*, 113 N. Y. 174, referring to this act, say: "The tax imposed by this act is not a common burden upon all the property or upon the People within the State. It is not a general but a special tax, reaching only to special cases and affecting only a special class of persons. The executors in this case do not, therefore, in any proper sense, claim exemption from a general tax or a common burden. Their claim is that there is no law which imposes such a tax upon the property in their hands as executors. If they were seeking to escape from general taxation, or to be ex-

empted from a common burden imposed upon the People of the State generally, then the authorities cited by the learned counsel for the People, to the effect that an exemption thus claimed must be clearly made out, would be applicable. But the executors come into court claiming that the special taxation provided for in the law of 1885 is not applicable to them, or the property which they represent. In such a case they have the right, both in reason and in justice, to claim that they shall be clearly brought within the terms of the law before they shall be subjected to its burdens. It is a well-established rule that a citizen cannot be subjected to special burdens without the clear warrant of the law."

To the same effect, see *Matter of Kennedy*, 113 App. Div. 4; *Matter of Miller*, 77 id. 473; *Matter of Vassar*, 127 N. Y. 12.

While there has been no decision exempting the right of curtesy from taxation, my attention has been called to a decision which exempted the value of a right of dower of a widow in her husband's real estate; and, as far as this is authority, I cannot help but feel that it substantiates this decision, because the husband's right of curtesy is as much his, as the widow's right of dower is hers, except for the fact that the wife has the right to divest him of it by will or deed if she sees fit so to do; but, when she fails, as in this case, to make any disposition of the property and dies intestate, then the right of curtesy in the husband becomes his without the power of any one to change it. It follows that the order, heretofore made, assessing and fixing the transfer tax upon the estate of Maria B. Starbuck should be reversed and the same remitted to the appraiser for modification, in accordance with this opinion.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of WILLIAM H. KOUWENHOVEN as sole Executor of the Last Will and Testament of ANTHONY CAREY, Deceased.

(Surrogate's Court, Kings County, April, 1909.)

EXECUTORS AND ADMINISTRATORS—DISTRIBUTION AND DISPOSAL OF PERSONAL ESTATE—FUNDS, ASSETS AND SECURITIES FOR DISTRIBUTION AND TO PAY LEGACIES—LIABILITY OF REALTY—RENTS COLLECTED BY EXECUTOR.

Where, at the time of the making of a will devising and bequeathing to testator's children in equal shares all the residue and remainder of his estate, his holdings of real and personal estate were such as to demonstrate an intention that the realty should be charged with the payment of specific legacies amounting to \$100,000 in case of deficiency of personal assets, a subsequent clause of the will that, in such contingency, the children should take the residuary estate in certain other specified proportions must be disregarded.

Rentals received by the executor under a provision giving him full power to lease or convey any or all the testator's real estate are applicable to the payment of the specific legacies.

Proceeding upon the judicial settlement of the account of an executor.

Van Wyck & Mygatt, for petitioner.

KETCHAM, S.—Upon the settlement of the executor's account it becomes necessary to determine whether certain specific legacies were charged upon both personal and real estate.

The will contains six legacies, amounting to \$100,000. It then proceeds:

"Seventh. All the rest, residue and remainder of my property and estate I give, devise and bequeath to my children equally.

"Eighth. If my estate should not be sufficient to pay these legacies I direct that my children share in my residuary estate

in the proportions as follows, namely, John and Joseph one-fifth each and each of the others one-tenth.

"Ninth. I give my executors or executor for the time being full power and authority to sell and convey or lease any or all of my real estate."

Under the power to lease, the executor has received rentals, the disposition of which requires the determination of the question above stated.

The testator's holdings of real and personal estate at the time when the will was made were such as to demonstrate an intention that the lands were to be devoted to these legacies, in so far as the personal estate was insufficient for the purpose, unless such intention is forbidden by the eighth paragraph (quoted *supra*).

The rule which is stated as one which admits of no exception in the construction of written instruments is that "Where an estate is given in one part of an instrument in clear and decisive terms, such estate cannot be taken away or cut down by raising a doubt upon the extent or meaning or application of a subsequent clause, nor by inference therefrom nor by any subsequent words that are not as clear and decisive as words of the clause giving that estate." *Roseboom v. Roseboom*, 81 N. Y. 356, 359.

In *Benson v. Corbin*, 145 N. Y. 351, it is said: "Where there is primarily a clear and certain devise of a fee, about which the testamentary intention is obvious and without ambiguity, the estate thus given will not be cut down or lessened by subsequent words which are ambiguous or of doubtful meaning. If a slight circumstance or a slender reason will in ordinary cases prevent the application of the general rule (that words referring to "death" are construed to mean "death during the lifetime of the testator"), the circumstance or the reason must be strong and decisive where the construction collides with a plain devise in fee, and forces a change of its terms by

cutting it down to a lesser estate. We do not easily trade a certainty for a doubt."

Under the rule stated in these cases, the eighth paragraph must be disregarded. Grammatically, it contains nothing of a dispositive character, since it only affects to dispose of a residue in case there is none. If it were sought to import into this paragraph a meaning which its terms refuse to yield, any effort to make use of such constructive meaning to cut down the clear and precise gift of the residue contained in the seventh paragraph would be forbidden by the cases cited.

So far as personal property was inadequate for the payment of the legacies the testator charged the same upon his real estate, and the decree should provide that the rentals which the executor has received under the power given to him by the will be applied to the payment of the legacies.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of Proceedings of FRANCIS SCHLOSSER as Administrator of ELIZABETH SCHLOSSER, Deceased.

(Surrogate's Court, Westchester County, April, 1909.

SURROGATES' COURTS—PROCEDURE AND REVIEW—ORDERS AND DECREES—OPENING, VACATING AND CORRECTING—GROUNDS—ERRORS OF LAW OR FACT.

Where by misconstruction of law part of the estate of an intestate survived only by cousins and descendants of deceased cousins was decreed to be paid to the descendants of the deceased cousins, the error should be reviewed by an appeal and not by a motion to open and modify the decree.

Motion to open and modify decree.

Emile A. Hassey, for petitioner; Thornton & Earle, for Lawrence Schlosser, Clara Schlosser and Marie Hicks in opposi-

tion; Wilson & Wallis, for Ralph L. Raymond and others, in opposition.

MILLARD, S.—This is a motion made on behalf of Francis Schlosser, Louis Schlosser and Bernhard Hoff, first cousins of the deceased, to reopen and resettle decree dated May 4, 1908, and entered May 9, 1908, by changing therein the distribution made of the estate in that decree.

The ground urged in behalf of the motion is, as appears from the petition verified November 16, 1908:

“That since the making and entering of said decree petitioner has been informed by his attorney, Emile A. Hassey, and verily believes it to be true, that his said attorney was mistaken as to the law applicable to the distribution of said estate, and that said decree was entered upon the erroneous interpretation of the statute of distributions by his said attorney, in that said attorney was then of the opinion that the law directed the distribution of said intestate's estate to and among her cousins of the first and second degree, and that, in said distribution, the second cousins took by representation the share of their deceased parent's ancestor. That this was the view also held by the other attorneys who appeared in this matter, and the decree herein was prepared and entered by petitioner's attorneys accordingly, the said other attorneys assenting thereto. That, as deponent has since been informed by his said attorney, by an amendment to the statute of distribution of intestate's estates, viz.: Section 2732 of the Code of Civil Procedure, subdivision 12, ‘No representation shall be admitted among collaterals after brothers' and sisters' descendants,’ which went into effect May 12th, 1905, the second cousins of said deceased were barred out and excluded from participating in the distribution of said intestate's personal estate, and that, therefore, the second cousins of said deceased, namely, Lawrence Schlosser, Clara Schlosser, Marie Hicks, Ralph L. Raymond, Cortland S. Ray-

mond and Marie A. Zuber, were not entitled to any portion or interest in the personal estate of said Elizabeth Schlosser, deceased, but that the entire personal estate of said decedent is distributable only amongst the first cousins of said decedent."

Whether, as a matter of law, the distribution made in the decree is erroneous and wrong, owing to a mistake in the construction of the law, is, to my mind, at this time, immaterial. The facts are that the decree referred to was presented to the court by the attorney for the petitioner in this proceeding; that said attorney also represented, as was conceded on the argument, the other parties who would be benefited by the change asked, if the motion were granted. Upon the return day of the citation, not only the attorney for the petitioner and the others above mentioned appeared, but Messrs. Wilson & Wallis also appeared for Cortland S. Raymond, Ralph L. Raymond and Mary A. Zuber, second cousins of said deceased, and two of the other second cousins filed waivers of the issue and service of citation and consented to the entry of a decree settling said account as filed. It also appears from the affidavit of Lawrence Schlosser, one of the second cousins of said intestate, that Emile A. Hassey also appeared and acted as attorney for him and his two sisters Clara Schlosser and Marie Hicks, so that, on the return day of the citation to attend the accounting of said administrator, all of the parties were represented by attorneys; and the said decree was settled upon notice to them and, by consent of all parties, was made, as all of them then believed, in accordance with the law.

The attorney for the petitioner now claims that he was mistaken in this respect; although it is still urged by Messrs. Wilson & Wallis and by Messrs. Thornton & Earle, who appear for all of the second cousins, that the original decree was correctly made in accordance with a proper construction of the statute. Under this state of facts, it is clear that, if any error has been committed, it is as to the construction of the law upon this sub-

ject and is a matter which should be reviewed by appeal and not by a motion to open and modify the decree; because the error, if any exists, is an error of substance and not a clerical error and this is an attempt to review the decision upon the merits.

That this cannot be done is clearly held in *Matter of Tilden*, 98 N. Y. 494, *Matter of Hawley*, 100 id. 206, *Matter of Henderson*, 157 id. 423, and *Matter of Ahlers' Estate*, 104 N. Y. 529.

It appears, from the petition filed on this motion, that all of the payments to the second cousins provided for in said decree have been made; and, upon the argument of this motion, it was stated that several of them had already expended their money and that it would be impossible for them to return it if the decree was modified or changed. While this may not affect the merits, it certainly should be considered in exercising discretion, if any existed, as is claimed by those in support of the motion, although I do not believe that it does exist.

This motion, of course, is made in accordance with the provisions of section 2481 of the Code of Civil Procedure, which has been construed and passed upon in the cases above stated and does not authorize a surrogate to interfere with such a decree as was made in this case upon the grounds asked for.

The motion to open and vacate the decree is therefore denied.
Motion denied.

Matter of the Judicial Settlement of the Account of Proceedings of FRANCOIS SCHLOSSER, as Administrator of the Goods, Chattels and Credits of ELIZABETH SCHLOSSER, Deceased.

(*Surrogate's Court, Westchester County, April, 1909.*)

DESCENT AND DISTRIBUTION—PERSONS ENTITLED TO SHARE OR INHERIT—COLLATERAL KINDRED OF DIFFERENT DEGREES—COUSINS AND DESCENDANTS OF DECEASED COUSINS.

Where a decedent left no nearer kin than cousins and descendants of deceased cousins, the cousins take the entire estate.

Proceedings upon the judicial settlement of the account of an administrator subsequent to the account involved in the last proceeding, *ante*, page 163.

Emile A. Hassey, for administrator; Thornton & Earle, for Lawrence Schlosser and others; Wilson & Wallis, for Ralph L. Raymond and others.

MILLARD, S.—There is apparently no dispute as to the correctness of the account filed in this matter by the administrator, but the question involved is as to the distribution of property left by the deceased and who is entitled to share therein.

Elizabeth Schlosser died, intestate, in the county of Westchester, on the 27th day of October, 1906. She left her surviving Francis Schlosser, Louis Schlosser and Bernhard Hoff, first cousins, and Lawrence Schlosser, Clara Schlosser, Marie Hicks, Ralph L. Raymond, Cortland S. Raymond and Marie A. Zuber, children of deceased first cousins of the said Elizabeth Schlosser.

The claim is made by the administrator that the estate is distributable to the first cousins, only; and that the last mentioned,

second cousins of said deceased, are not entitled to share therein.

By the Revised Statutes of the State of New York it was provided, and this provision was afterward incorporated into section 2732 of the Code of Civil Procedure, subdivision 12, "that no representation shall be admitted among collaterals after brothers' and sisters' children."

This statute was passed upon by the Court of Appeals in *Adee v. Campbell*, 79 N. Y. 52, which was a case similar in all respects to the one under consideration; and the court there unanimously held that the first cousins took the whole estate to the exclusion of the second cousins and that the children of brothers and sisters referred to are the brothers and sisters of the intestate. The statute continued in exactly this condition until 1898, when the Legislature struck out the then existing subdivision 12, above referred to, and substituted the following in its place: "Representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate;" and this provision was passed upon by the Court of Appeals in *Matter of Davenport*, 172 N. Y. 454; but by this decision the former decision is in no way affected, but, in so far as it is in any way useful in deciding the matter before me, it follows a similar line of reasoning and intimates that the former decision would be adhered to if the same conditions existed. This subdivision 12 was again changed in 1905 and now reads: "No representation shall be admitted among collaterals after brothers' and sisters' descendants."

The present law, therefore, is exactly the same as the original Revised Statutes and the original subdivision 12 of section 2732 of the Code, except that the word "descendants" has been substituted for the word "children."

The counsel for the second cousins in this proceeding claim that, by subdivision 5 of section 2732 of the Code, the whole surplus of an estate shall be distributed to the next of kin of

equal degree to the deceased and their legal representatives, if there be no widow and no children and no representatives of a child; and that by subdivision 10 of the same section, where the descendants or next of kin of the deceased entitled to share in his estate are of equal degree to the deceased, their share shall be equal; and, by subdivision 11, that, when such descendants or next of kin are of unequal degrees of kindred, the surplus shall be apportioned among those entitled thereto according to their respective stocks; so that those who take in their own right shall receive equal shares and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled; and from this they argue that the second cousins are entitled to share in the estate. They admit, however, that they are unable to give any force to the provision of subdivision 12 as it now appears. I cannot believe that they are correct in their contention; and, even if, as they say, the provisions are inconsistent with each other, I do not think that it is necessary for me to bother with this question at all. I am satisfied that the provisions of subdivisions 5, 10 and 11 referred to by the attorneys for the second cousins, as well as all the other subdivisions of section 2732 of the Code, must be read in connection with subdivision 12, as amended, and subject to its provisions; and I cannot see how the present language of the statute differs in any material respect, so far as this case is concerned, from the case of *Adee v. Campbell*, above referred to; and I therefore decide that the first cousins, Francis Schlosser, Louis Schlosser and Bernhard Hoff, are entitled to all of the estate accounted for in this proceeding in equal shares.

Decreed accordingly.

Matter of the Probate of the Last Will and Testament of
MARY E. ABEL, Deceased.

(*Surrogate's Court, Kings County, April, 1909.*)

WILLS: DISPOSAL BY WILL—MISTAKE, FRAUD AND UNDUE INFLUENCE—EVIDENCE—DEVISE OR LEGACY TO COUNSEL OR DRAFTSMAN—HUSBAND AS DRAFTSMAN: THE TESTAMENTARY INSTRUMENT OR ACT—EXECUTION OF WILL—EVIDENCE OF EXECUTION—ATTESTATION CLAUSE—NOT EVIDENCE OF FACTS STATED; SUFFICIENCY OF EVIDENCE—CIRCUMSTANCES SUPPORTING PROOF BY HANDWRITING.

Where the three subscribing witnesses to a will having no attestation clause are dead, but their handwriting and that of the testatrix is established, and it affirmatively appears that at the time of the transaction the decedent was competent to make a will and was under no restraint, the will, though in the handwriting of the testatrix's husband to whom the whole estate was devised, will be admitted to probate.

Seemle, an attestation clause which recites the acts required for the due execution of a will is not evidence that such acts were in fact performed, but it shows that the witnesses knew what was required and, to that extent, affects the presumption that arises from the presence of the signatures of the testator and the witnesses that what they did was done with due ceremony and solemnity.

See 67 Misc. 197.

Proceeding upon the probate of a will.

Charles H. McCarty, for proponent; Francis X. Carmody, for the contestant.

KETCHAM, S.—A document is offered for probate after the death of three persons whose signatures appear as witnesses, at the end thereof, after the signature of the alleged testatrix. The instrument was made and witnessed on May 1, 1894, and is in all respects in the form of a will. There is no attestation clause, except that, immediately above the names of the witnesses, the word "witnesses" is written.

The handwriting of the decedent and all the subscribing witnesses in the signatures referred to is established. It is affirmatively shown that, at the time of the transaction, the decedent was competent to make a will and was under no restraint.

The instrument was written by the husband of the decedent. He was allowed by the contestant to testify that his own will, also in his handwriting, was made at the same time when his wife's will was made; that his will was signed in the presence of the witnesses, the same witnesses who attested the paper propounded as the wife's will; that these persons signed as witnesses to his will, in his presence and at his request, and that, at the time when he signed it, he declared it to be his last will and testament.

Each instrument contains a general and absolute devise, in one case by the husband to the wife, and, in the other, by the wife to the husband, with substantially the same provisions in the event of the death of the devisee before the death of the testator.

The husband was present when the decedent signed the paper propounded. No lawyer was then present. The husband, upon interrogation by the contestant, testifies that he consulted his wife when he was drawing the will (meaning the propounded paper), that she was perfectly agreeable, that he talked it over with her and that it was perfectly satisfactory to her.

When asked by the contestant's counsel, "Did Mrs. Abel say anything when she signed her name to the paper?" the husband answers, "I don't remember, but I suppose she did say something."

When the instruments were signed, the wife owned the house in which she and her husband had lived for twenty-seven years. It was worth about \$7,000, and she had personal estate worth about \$1,000 more. The husband's estate was of the value of about \$55,000. When the house was purchased, in 1867, there was a mortgage on it for \$7,000, which the husband had paid

off with his own money before the papers in question were made.

The contestant was permitted to prove, without objection, that the wife once, after the execution of her alleged will, said that the house was hers to do what she wanted with and that it was her husband's present to her; and that she frequently, both before and after the making of the paper in question, declared her intention that the house was to go to her brother and his wife.

It also appears that the wife, at least once, signed a paper without reading it, upon the request of her husband and his assurance that it was all right. The wife lived for fourteen years after signing the propounded instrument, and the husband testifies that, after her death, he found the paper in her private box, as he supposes. Both husband and wife were advanced in years when the two papers were signed; they had been married about fifty-five years; they were childless and they lived in affection and concord.

In case of the death of all of the subscribing witnesses to a written will, as well as in many other instances mentioned in the statute, where their testimony is not available or is hostile to the fact of the will, "the will may nevertheless be established, upon proof of the handwriting of the testator, and of the subscribing witnesses, and also of such other circumstances, as would be sufficient to prove the will upon the trial of an action." Code Civ. Pro., § 2620.

To "establish" a will is to make it the subject of such proof and finding as will entitle it to probate. It is in this sense that the word is used in respect to lost and destroyed wills (Code Civ. Pro., §§ 1861 *et seq.*, 2621), as well as in the almost daily application of section 2620 to the case where, failing the testimony of the witnesses, the will is admitted by force alone of the attestation clause.

Hence, the will at bar will be established, and its probate

must follow, if the evidence be found to be of the quality and weight which would, upon the trial of an action, sustain a finding that this was the will of the decedent.

What, then, would happen if, upon a trial in ejectment, before the court without a jury, this will were offered upon this evidence in proof of the plaintiff's title and cause of action? In such a trial the finding would be, as it is in this case, that the decedent at the time of the transaction was competent to make a will, was not under restraint, was fully aware of the testamentary nature of the instrument which she signed and of its specific tenor and purpose, and was intelligent and deliberate with respect to its execution.

Whether or not, under all the requirements of the statute, the act became a will, it was surrounded by conditions fairly revealed in the evidence which expel suspicion and reduce the case to the single question, whether or not proof of the genuineness of all the signatures upon the propounded paper raises a presumption that all the statutory formalities essential to a valid will were duly observed.

This presumption has always been indulged and has been held to control the question of fact, when not impaired by affirmative evidence or by suggestions of distrust and uncertainty. This rule is stated in many cases; and, while generally its expression has not been strictly essential to the decision, it has been repeated so frequently and so confidently and with such wealth of reasoning that it should now be regarded as authoritative, even if it depended alone upon *obiter* opinion. *Jackson v. La Grange*, 19 Johns. 386; *Dan v. Brown*, 4 Cow. 483; *Jackson v. Vickory*, 1 Wend. 406; *Jauncey v. Thorne*, 2 Barb. Ch. 40; *Butler v. Benson*, 1 Barb. 526.

The ground for the proposition stated in these authorities is that all things which the testator and the witnesses have done are presumed to have been done with ceremony and with solemnity. Either they have done an idle and abortive thing or their

signatures have been made with all the purpose and the observance which would accompany and make manifest a complete and efficacious act.

If against this presumption no fact appears which either affirmatively shows their act to have been aimless or casts doubt upon its regularity and efficacy, the law must conclude that the act was orderly, intelligent and effective.

It is only by resort to these principles that the law lays hold of the attestation clause as a means of proof in the case grown to be familiar to the profession. *Matter of Sizer*, 129 App. Div. 7, and cases cited.

This clause has no statutory dignity. It is a mere certificate by the witnesses which, without ritualistic authority, has grown into the practice of good draftsmen. It is no proof of the matters therein stated. Neither under any general rule of evidence nor under any regulation specifically applicable to wills could this clause be offered in evidence as a direct means of proving that the things therein said to have been done were in truth done.

Its utmost value is only that, in a transaction which for its accuracy and perfection requires the parties thereto to do certain things, the witnesses seem at the time to have said that these things were done. From the mere naked fact that the witnesses then apparently said that the requirements of the statute were regarded, we assume, first, that they knew and considered the statements contained in the attestation clause and, second, that upon that assumption may be based the further one that their certificate was not only intelligent but correct. From these two assumptions it is customary to conclude that the circumstances generally justify the result that the will was duly published and attested.

Is this anything except the application of the presumption that the witnesses, in signing the attestation clause, must have done so with all the circumstance which ordinarily should ac-

company the act of faithful witnesses? Is there any difference between the legal inference which is drawn from the attestation clause and the like deduction which the proponent seeks to draw from the mere signing of the propounded paper, without an attestation clause?

The weight of evidence which provokes the presumption may differ in the two cases, but it is impossible to see any difference in character. In one instance it is inferred that signatures to a statement in writing were made with all the accompaniments of regularity; in the other, that signatures at the end of a paper of a testamentary nature were made under like conditions.

In holding that *prima facie* witnesses who have signed their names at the end of a will, after the testator's name, have witnessed and heard the publication and request which properly attend the making of a will, we but apply to an act, the necessary components of which are defined by statute, the same methods which are freely resorted to with regard to an act which is not the subject of statutory recognition or direction.

Indeed, there is an attestation clause upon the paper in question, in the word "witnesses." Those who signed their names thereunder have attested: "We have witnessed the act of Mary E. Abel which she has performed in signing the foregoing instrument, and we have signed our names in attestation of that fact."

The evidence in this case being wholly consonant with testamentary intention, the fairness of the transaction and freedom from restraint, we are forced to the conclusion, upon the mere appearance and genuineness of the signatures, that the will was accompanied by all which goes to make up a valid and efficient execution and publication.

The precise question which this will presents was before the late Surrogate Fitzgerald and was determined in favor of probate. Matter of Oliver, 13 Misc. Rep. 466. It does not clearly appear from the opinion, but inquiry in the office where the

will is recorded discloses, that there was no attestation clause upon the instrument which Judge Fitzgerald considered; and it is impossible to distinguish the facts there presented.

There must be the usual decree of probate.

Probate decreed.

Matter of the Probate of the Last Will and Testament of MARGARET KARRER, Deceased.

(Surrogate's Court, Kings County, April, 1909.)

WILLS—THE TESTAMENTARY INSTRUMENT OR ACT—EXECUTION OF WILL—SUFFICIENCY OF ATTESTATION.

Where at the time the signatures of the testator and witnesses were subscribed to an instrument it was not properly executed and attested as a will, but thereafter, as a new transaction, the testator acknowledged his signature, declared his will and requested the witnesses to attest the same and the witnesses, thereupon, to the knowledge of the testator, acceded to his request and adopted their previous signatures as an attestation of the transaction, they may be held to have signed them as subscribing witnesses within the requirements of the statute.

Proceeding upon the probate of a will.

Isaac Sargent (Henry Parsons, of counsel), for petitioner;
O'Neil & O'Neil, for contestant.

KETCHAM, S.—The paper offered for probate was signed by the testatrix and by the witnesses with such copious disregard of the statutory requirements that its validity would have to be confessed, were it not that, immediately thereafter and upon a separate occasion, the witnesses were brought into the presence of the testatrix, and the testatrix acknowledged her subscription thereto in the presence of each of the attesting witnesses, declared the instrument to be her last will and testament and requested the witnesses to attest her act; and the witnesses, with the knowledge of the testatrix, reaffirmed their previous signa-

tures without further writing. Upon this second attempt nothing was wanting to a complete transaction, unless it be that the witnesses did not then write their names anew.

There is no suspicion of unfairness, restraint or mental incapacity; and the sole question is whether or not there was a fair compliance with the statute requiring that each witness "shall sign his name as a witness at the end of the will at the request of the testator."

In *Matter of Stickney*, 31 App. Div. 382, Mr. Justice Follitt, in rejecting the claim that a will, once revoked, had been republished by its acknowledgment to persons who were not the original witnesses, and who did not then subscribe as witnesses to the republication, used the following words which, however they might have illustrated his argument, were not essential to the decision:

"If it (the will) is republished in the presence of the original subscribing witnesses it may not be necessary for them to subscribe the will anew as witnesses, for the rewriting of their signatures would seem to be a useless formality. But the mere acknowledgment or publication by a testator of a will which has been revoked to persons who were not the original subscribing witnesses, and who do not then subscribe as witnesses the republished will, is not a compliance with the 53d section of the statute."

In *Vaughan v. Buford*, 3 Bradf. 78, the will was drawn pursuant to the instructions of a testator who was ill of cholera. Thereupon, in a room apart from the testator, the draftsman signed the name of the testator and he and another signed their names as witnesses. Thereafter, the testator and the witnesses all present, the paper was read to the testator, including the names of the witnesses signed to it, and he was told that the draftsman had signed his name. He said that he could write his own name. His name, already written, was erased, and he wrote his own name. Mr. Surrogate Bradford says:

"The names of the witnesses were read in connection with the other portion of the paper, and he must have seen them when he signed it. These circumstances seem to me to satisfy the statute in spirit and substance. The witnesses may be said to have signed at the decedent's request, when their names having been read over to him and seen by him, he set his own signature to the document. * * * We have in the evidence before us, the most unequivocal testimony that the attestation was with his consent and full approbation, and that the nature of the transaction was well understood by everybody present. The intention of the decedent was most clear; that he desired to carry it out was manifested by the act of signing after the reading of the paper, by which act he ratified and confirmed all that had been done, making, as it were, the acts of others, so far as his request was necessary, receive an *ex post facto* confirmation."

In *Matter of Stewart*, 2 Redf. 77, the question arose whether there was a request to the witnesses before they signed. There was no express request. The court says:

"I am further of the opinion, that the reading of the attestation clause signed by the witnesses, stating that they subscribed by request of the testator in his presence, without objection from him, may be regarded as an adoption of a request to that effect, though, subsequent to the signing by them. This view is not opposed to *Jackson v. Jackson*, 39 N. Y. 153."

Clearly the same rule by which a request, made after the subscription by the witnesses, may relate back to a moment before the actual subscription will require that, under the same circumstances, the publication as well as the request may be regarded as having accompanied or preceded the signing by the witnesses.

In *Jackson v. Jackson*, 39 N. Y. 153, it was held that probate should be denied where the witnesses signed before the testator's act of signature; but in that case there were no words of publication, acknowledgment of the testator's signature or

request to the witnesses, after the testator had subscribed the instrument. Upon the facts there apparent the case determines nothing except that a will is not properly solemnized when the signatures of the witnesses, which were made at the request of the testator but before his own subscription, are followed by his own subscription without any renewal of his publication or request. As appears from the language of the opinion quoted *infra*, the decision rests upon the absence of any publication or request after the paper was subscribed, as well as the lack of any proof that the witnesses by their signatures attested an act which had not been done when their names were written. The court says of the witnesses:

"They are, in and by this act of signing their names, to attest, not only the signing or acknowledgment, but the *cotemporaneous* declaration that it is his will. Their *signatures* do not attest the signing by the testator, if they are placed there before the will is signed by him. For some period, longer or shorter, as the case may be, those signatures attest no execution — they certify what is not true.

"When, and in what moment, do they begin to operate as a compliance with the statute? The only reply that can be given is, when the testator signs his name.

"This is a dangerous construction of the statute. May the testator keep these signatures in his possession one hour, one week or one year, and then add his signature? Certainly not, unless he summons the same persons to see him sign, or hear his acknowledgment thereof."

From the last sentence quoted, it is obvious that, in the personal opinion of the judge who wrote, the result would have been otherwise, if, after the signatures of the testator and the witnesses, there had been a further publication and request followed by the adoption of the witnesses' former signatures both by themselves and the testator.

The evidence in the case at bar does not permit a finding that

these two attempts at will making constituted a single occasion, for there was a distinct break in the transaction between the original signing of the will and the final effort to cure the deficiencies which first existed. Nor is the probate ended by the decisions that the acts prescribed by the Statute of Wills need not always be done in the order usually and properly observed.

If the witnesses did not sign their names after the testatrix had signed and after her publication and request were made in their presence, then they did not ever sign as witnesses for the purposes of the statute; for the only request and the only attestation of which the circumstances permit, and in fact the only observance of any kind which took place in the presence of both witnesses, must have come to pass after the acknowledgment by the testatrix and her subscription formerly made.

The cases cited indicate that, where the signatures of the testator and of the witnesses all appear upon an instrument which has not yet been properly executed and attested, the witnesses may be said to have signed as such for the purposes of the statute if, as a new transaction, the testator acknowledges his signature, declares his will and requests the witnesses to attest the same, and the witnesses, thereupon, to the knowledge of the testator, accede to his request and adopt their previous signatures as an attestation of the transaction.

The law in its zeal for probate could not go much further, but authority justifies the admission of this will.

It will be decreed accordingly.

Probate decreed.

Matter of the Estate of ELLEN L. DUNN, Deceased.

(Surrogate's Court, New York County, April, 1909.)

EXECUTORS AND ADMINISTRATORS—RIGHTS AND LIABILITIES BETWEEN REPRESENTATIVE AND ESTATE—ITEMS CHARGED OR CREDITED—RENTS AND PROCEEDS OF LAND.

An administratrix with the will annexed who is also a tenant in common with another, of certain real estate devised by the will, cannot be called to account by the surrogate for rents collected.

Application to revoke letters of administration.

Alfred B. Jaworower, for petitioner; John T. Fenlon, for administratrix *cum testamento annexo*.

THOMAS, S.—According to the undenied averments of the petition the incompetent, whose committee is the petitioner, and the respondent are owners as tenants in common in equal shares of a parcel of real estate in this city, their titles having been acquired by devises contained in the will of the decedent. The respondent is also administratrix with the will annexed of the estate of the decedent. The respondent has for years collected the rents of said real property, and has from time to time accounted to the petitioner for the share of the incompetent. The present application is to revoke the letters of administration with will annexed on the ground that the respondent has not promptly accounted for all of said rents. Upon the facts stated the relief asked for cannot be granted. The respondent as an administratrix has no right to or control over the rents of the devised real property, but by virtue of her legal rights as a tenant in common she was entitled to collect the rents, and she cannot be called to account therefor before a surrogate. *Matter of Spears*, 89 Hun, 49.

The application must be denied.

Application denied.

Matter of the Estate of ELLEN L. DUNN, Deceased.

(*Surrogate's Court, New York County, April, 1909.*)

EXECUTORS AND ADMINISTRATORS—APPOINTMENT AND QUALIFICATIONS OF PERSONAL REPRESENTATIVE, RESIGNATIONS AND REMOVALS—REMOVAL OR SUBSTITUTION AND REVOCATION OR MODIFICATION OF LETTERS—IN GENERAL—WHEN SURROGATE'S COURT WILL NOT EXERCISE JURISDICTION.

SURROGATES' COURTS—NATURE AND EXTENT OF JURISDICTION—IN GENERAL—INCIDENTAL JURISDICTION—WHEN COURT WILL REFUSE TO EXERCISE JURISDICTION DURING PENDENCY OF ACTION IN SUPREME COURT.

Where a doubtful question as to the construction of a will is involved in an action pending in the Supreme Court for the partition of real property, the Surrogate's Court will not pass upon the question on a summary application to revoke letters of administration *cum testamento annexo*, though the question is also involved in the latter proceeding, but will dismiss the application without prejudice to a renewal thereof after the termination of the action.

Application to revoke letters of administration.

Alfred B. Jaworower, for petitioner; John T. Fenlon, for administratrix *cum testamento annexo*.

THOMAS, S.—Among the supplementary papers submitted by the parties, which reached me after the filing of my previous memorandum of decision, I find a copy of the will of the decedent. An examination of that will satisfies me that it is not at all clear that the real property in question was devised to the two children of the decedent as tenants in common, as alleged in the petition in this proceeding, and that it may be that a proper construction of the paper requires the conclusion that the devise was to the executors for purposes of sale, coupled with a mandatory power to sell and divide the proceeds, thus leaving the legal title in the executors, bound by trusts, in all respects as if it had forthwith been converted into personalty. This question is before the Supreme Court for decision in the

pending action for partition, and I should not upon this summary application to revoke the letters *cum testamento annexo* of the administratrix with the will annexed embarrass that tribunal by attempting to pass upon it. The proceeding will therefore be dismissed, without prejudice to renewal thereof after the termination of that action.

Proceeding dismissed.

Matter of the Judicial Settlement of the Accounts of GRACE S. SLOANE, as Administratrix of the Goods, Chattels and Credits of DOUGLAS SLOANE, Deceased.

(Surrogate's Court, Westchester County, May, 1909.)

PRINCIPAL AND SURETY—NATURE AND CREATION OF RELATION—NATURE OF CONTRACT.

A person financially embarrassed, against whom a judgment had been recovered for a large amount and an action had been begun, upon another claim upon which judgment was afterward rendered, gave his wife a general power of attorney and then disappeared and was not seen for several months at the end of which period he was found ill and soon afterward died. During his absence his wife applied to the trustee of his father's estate to furnish the money with which to purchase the judgments, and to secure this money she gave the trustee, as attorney for her husband and individually, a mortgage on their residence and the judgments were purchased and the trustee took assignments of them. After the execution of the bond and mortgage, the husband executed to his wife a quitclaim deed of the mortgaged premises. The trustee of the father's estate carried the bond and mortgage as an investment of the estate he represented; and, upon the settlement of that estate, assigned to the wife, who was then administratrix of her husband's estate, he having died, as such administratrix, the bond and mortgage on account of his interest in his father's estate and at the same time satisfied the judgments which had been assigned. The administratrix, in thereafter rendering her account of her husband's estate, claimed that the bond and mortgage were given as collateral to the judgments and that by the satisfaction of the judgments the bond and mortgage were discharged. *Held*, that the

bond and mortgage, and not the judgments, constituted the principal debt in the hands of the trustee of the father's estate and were not discharged by the satisfaction of the judgments, but, upon assignment to the administratrix, became assets in her hands for which she should account.

Proceedings upon the judicial settlement of the accounts of an administratrix.

Gould & Wilkie, for administratrix; Strauss & Anderson (Eugene D. Boyer, of counsel), for contestant; Theodore M. Hill, special guardian.

MILLARD, S.—The account of the administratrix was filed in the office of the surrogate of the county of Westchester on the 23d day of June, 1908, and a citation duly issued to all parties interested in said estate, returnable on the 20th day of July, 1908. Said citation was returned duly served on all parties interested July 20, 1908. On July 28, 1908, Theodore M. Hill was appointed special guardian for Douglas Sloane and Anna M. Sloane, two of the heirs at law and next of kin of said Douglas Sloane, deceased. On December 10, 1908, said special guardian filed objections to the account of said administratrix in behalf of said infants; and on December 8, 1908, Strauss & Anderson, attorneys for Maggie Jackson Sloane Mills, another of next of kin of said deceased, filed objections to said account. Previous to the filing of said objections, and on the 3d day of December, 1908, said administratrix filed a supplemental account of her proceedings. The objections of the special guardian and the attorney for Maggie Jackson Sloane Mills are similar in all respects, and can be treated as if but one set of objections had been filed.

Douglas Sloane died intestate, on or about September 11, 1892, leaving him surviving his widow, Grace S. Sloane, the administratrix in the proceedings, and the three children, Mag-

gie Jackson Sloane Mills, Douglas Sloane and Anna M. Sloane and a child since deceased, as his only heirs at law and next of kin. His widow was duly appointed administratrix of his estate on the 21st day of October, 1895. Douglas Sloane, the decedent in this matter, was the son of Douglas Sloane, who died in 1872, leaving his estate to his brother John Sloane, as trustee, to pay the income to the widow for life, with remainder to his three children, of whom Douglas Sloane was one.

In 1891, Douglas Sloane became involved financially and, on December 5, 1891, a judgment was recovered against him in Westchester county by the Manufacturers' Finance and Trust Company for \$15,554.39; and, on January 26, 1892, an action was commenced against him in New York county by Lydia A. Peck for \$4,000, money loaned. On the 5th day of February, 1892, he executed a power of attorney to his wife, the administratrix in this proceeding, giving her general power to manage his affairs, to raise money to pay his debts, and thereafter disappeared. He was not seen again until several months later, when he was found very ill, taken to a hospital and died, as above set forth.

After his disappearance, his wife, Grace S. Sloane, the administratrix herein, consulted with John Sloane, the trustee of the estate of Douglas Sloane, her husband's father, in reference to his affairs; and, in order to protect the remainder interest of Douglas Sloane from sale under execution, she arranged an advance of a sufficient sum out of the trust estate to satisfy the Manufacturers' Finance and Trust Company and Lydia A. Peck claims. In order to do this she, as attorney in fact for her husband, Douglas Sloane, and individually, executed a bond and mortgage upon the real estate where she resided at Rye, in the county of Westchester, for the sum of \$15,000, and delivered the same to John Sloane, as trustee of the estate of Douglas Sloane, by whom said funds were advanced. This bond and mortgage bears date February 11, 1892, was payable in one

year, with interest at five per cent., and recorded in the Westchester county register's office in liber 1002 of mortgages, page 406. The attorney for the trustee upon the execution of this mortgage paid to the Manufacturers' Finance and Trust Company the sum of \$10,688.33, and received from it an assignment of its judgment to the trustee, John Sloane, dated February 10, 1892, which assignment was filed February 12, 1892, in the county clerk's office in Westchester county; and, on April 25, 1892, he paid to Lydia A. Peck \$4,232.93, and received a similar assignment of her judgment, which had been docketed February 17, 1892, filing the assignment in Westchester county. The bond and mortgage executed as above was carried on his books by the trustee, among other bonds and mortgages in which the trust estate was invested, for the sum of \$14,916.26, the amounts which he had paid out as above. On the 10th day of August, 1892, Douglas Sloane executed a quitclaim deed to his wife of the Portchester property, upon which this mortgage was given, and this deed was recorded in the Westchester county register's office on the 11th of August, 1892, in liber 1284 of deeds, page 56.

It is claimed in this proceeding that some time in 1889 Sloane had given a deed to his wife of this property, but it was never recorded and no delivery of the same can be proven except by her statement. In connection with this matter the administratrix has filed a number of affidavits. Her own affidavit, referring directly to a transaction with the deceased, I feel cannot be considered, as she certainly would not be allowed to testify to the facts therein stated if upon the witness stand in court. None of the other affidavits prove execution and delivery of a deed, but simply refer to statements made in connection therewith; and, while they might be considered for what they are worth, if it was a question which this court had jurisdiction of, having none, I do not feel that they can affect the matter in any

way, as I am certain that in this proceeding I cannot try the title to real estate.

John Sloane, the trustee of Douglas Sloane, the elder, having died, the United States Trust Company was appointed in his place, and upon the death of the life tenant, on the 18th day of February, 1906, proceeded to wind up and distribute the estate of Douglas Sloane, the elder; and, on December 17, 1906, it assigned to Grace S. Sloane, as administratrix, the bond and mortgage of February 11, 1892, credited her on its books with the payment of \$14,916.26, and debited her with a similar sum as received by her on account of the distributive share of her intestate, Douglas Sloane. It also debited and credited her with the sum of \$7,094.22, the interest thereon from its date until the death of the life tenant, on the 18th of February, 1906.

The administratrix in this proceeding charges herself with the full amount of the estate received from the trustee, and then credits herself with the amount of this mortgage and the interest paid thereon as above; and it is to these items that the objections are filed on behalf of her children, the next of kin of said Douglas Sloane.

Grace S. Sloane, the administratrix in this proceeding, was a party to the accounting proceedings of the United States Trust Company, and no objection was made by her to the accounts as filed by the United States Trust Company, and the accounts were judicially settled as presented.

In Schedule "A" of said account it charged itself, under heading of "Bonds secured by mortgages covering real estate," bond of Douglas Sloane, \$14,916.26 (Schedule "G," folio 16). This condition was admitted by counsel for administratrix on the hearing before me. The judgments above referred to were satisfied by the United States Trust Company, to whom they had been assigned, but they did not satisfy the bond and mortgage upon the real estate, but assigned the same as above set

forth to Grace S. Sloane, the administratrix herein, who herself afterward satisfied it.

It is claimed by the attorneys for the administratrix herein that the judgments in this case are the primary debts, while the attorneys for the objectants claim that the bond and mortgage is the primary debt, and each proceeds to argue, assuming that he is correct in that respect. I am inclined to believe that the bond and mortgage should be considered the primary debt, because if it were not for this I do not believe the trustee of Douglas Sloane, the elder, would have advanced any money from that estate. He was not authorized by law to use the funds of the estate to buy these judgments or make a loan of said funds, taking these judgments as security therefor; but he was, as trustee, authorized to invest the funds of his estate in bond and mortgage; and I think it must be presumed that, as an official of the court acting under his oath of office, he did what the law requires rather than something which would be held to be illegal if the matter were called to the attention of the court. I, therefore, believe that the transaction, as viewed by him, was an investment of \$14,916.26 upon real estate in the town of Rye, which belonged to Douglas Sloane, and that his attorney advised him to take the assignment of these judgments as collateral to the mortgage for the purpose of showing how the proceeds of this mortgage were used by him, or for any other purpose which might be deemed necessary. It could not be very well said that a mortgage dated February 11, 1892, could be given as collateral security to a judgment which was not recovered until after that date.

The account in this proceeding, as originally made by the administratrix, and before her attention was called to the objections which were to be made and filed in this case, shows that she herself considered that she paid the bond and mortgage from the estate. See Schedule "D," where she claims an allowance for "Bond of Douglas Sloane to John Sloane, as trustee, and se-

cured by joinder of his wife in the obligation and her mortgage of her house at Portchester, N. Y., dated February 11, 1892, and paid by administratrix December 17, 1906, \$14,916.26." And, again, as to the other payments for interest referred to in the same schedule, wherein she asks credit for "interest on the bond and mortgage above mentioned, so paid by the administratrix to John Sloane, as trustee, and his successor during the period from the making of said bond and until payment of principal thereof on December 17, 1906."

To my mind, therefore, it is clear that the trustee intended the bond and mortgage to be the primary debt, and I believe the administratrix herself so intended it; and I cannot help but believe that it was suggested to her by her attorney that it be credited in the other way.

"It is the settled doctrine in equity that one who purchases land subject to a mortgage makes the land thereby the primary fund for the payment of the mortgage debt." *Matter of Wilbur v. Warren*, 104 N. Y. 197.

The case of *Hetzel v. Easterly*, 96 App. Div. 517-529, was a case almost identical with the case at hand, and there the court said: "This \$1,500 mortgage was upon the land which the testator during his lifetime gave without any valuable consideration to his widow. Under those circumstances we think the land covered by the mortgage was the primary fund out of which it should be paid, and that it was unlawful for the widow and her coexecutors to attempt, from the general property of the estate, to pay it off so as to relieve therefrom the property presented to her individually before the death of the testator."

In the case before me *Douglas Sloane*, six months after the making of the mortgage by his wife, individually and as attorney in fact for him, conveyed the property to her by a quitclaim deed and she then became the owner; and, in view of the decisions, I believe that the mortgage given by her was a lien thereon and that the land covered by it became a primary fund

for the payment of that mortgage. The fact that the deed was a quitclaim deed is an evidence to my mind of the fact that Douglas Sloane, the maker of it, was of the opinion and intended that only the equity of redemption, after this mortgage had been paid, was to go to his wife; otherwise there would have been no occasion for making a quitclaim deed.

It is also equally well settled that an executor or trustee holding a claim against the trust estate is required to prove the same by the strongest kind of evidence; and, in this case, the allowance to the widow of the amount paid for this mortgage and interest would be allowing a claim to her against the estate and should not be done, where the only other parties interested are her own children, unless the strongest kind of legal proof is produced in support thereof.

If this claim is allowed to the widow, she then becomes the owner of the real estate which Douglas Sloane owned on the 11th day of February, 1892, when the mortgage was made, free and clear of all incumbrance. This would not have been the case had the payment of the judgment been enforced at the time they were obtained. The most natural thing for these creditors to have done would have been to have levied upon this real estate and sold it, and the judgments would have been satisfied from it. This is certainly the natural course of events rather than to believe that they would have taken the proceedings necessary to have acquired the rights of Douglas Sloane in the remainder in his father's estate, with which they could do nothing until after the death of the life tenant. They would naturally have taken the property, which would have brought their money in the shortest possible way.

I think, therefore, it is both just and equitable that this same course should be pursued, and that the estate of Douglas Sloane should be adjudged the owner of the bond and mortgage which was assigned to the administratrix in this proceeding as against the property in Rye; but, as she has already satisfied it, that the

same, together with the interest paid thereon, should be deducted from her share of said estate.

I, therefore, sustain the objections made to the said account and will sign a decree in accordance with this decision.

Decreed accordingly.

Matter of the Administration upon the Estate of ALONZO W.
TERWILLIGER, Deceased.

(Surrogate's Court, Dutchess County, May, 1909.)

MARRIAGE—EVIDENCE AND QUESTIONS OF LAW AND FACT—SUFFICIENCY—
COMMON LAW MARRIAGE.

Where a husband after the death of his wife, from whom he had been living separate and apart for several years, agreed with the woman who had been his mistress since the separation to live together as man and wife and they did so live until his death; and, though no ceremonial marriage took place, the testimony is clear that from the death of his wife he, by declarations verbal and written, conduct, repute and reception among neighbors, acknowledged her to be his wife and her child by him born before the death of his wife to be his lawful son, the former mistress will be held to be the lawful wife of decedent and his widow and entitled to letters of administration upon his estate and said son legitimate.

Application to revoke letters of administration.

Morschauser & Hoysradt, for petitioner; George Wood, for administrators; Dan J. Gleason, special guardian, for Leon Terwilliger; Adelbert Haight, special guardian, for Iris Terwilliger.

HOPKINS, S.—Decedent died at town of Red Hook, this county, April 2, 1909. On April 6, 1909, letters of administration upon his estate were granted by this court to his daughter, Hattie Moore, and John L. Tests, upon the daughter's ap-

plication, founded upon a petition stating that she and one Leon Terwilliger, an infant grandson of deceased, were his only heirs at law and next of kin. Subsequently, and on April 9, 1909, a petition was filed in this court by Letitia Terwilliger, in which she alleged that she was the widow of deceased, and that one Iris Terwilliger, a minor, was a son and heir at law of deceased and entitled to a distributive share of his estate with the above-named daughter and grandson, and praying that the letters of administration issued to Hattie Moore and John L. Teats be revoked, and that letters of administration be issued to said Letitia Terwilliger as widow of deceased. A special guardian was appointed for each of said infants, who duly appeared but filed no objections. The administrators filed an answer to said petition, in which they denied that Letitia Terwilliger was the widow of decedent, or that she was married to him, or that she had any interest in said estate. Upon the issue thus joined both parties produced considerable testimony bearing upon the relations of the deceased to the person claiming to be his widow, but, before considering the evidence, it is well to briefly consider the rules of law uniformly applied in disposing of similar questions.

In *Tracy v. Frey*, 95 App. Div. 579, in which the leading cases upon marriage and legitimacy of children are cited and discussed, the court says: "In the absence of proof the presumption is of marriage arising out of cohabitation in the apparent relation of husband and wife, of the innocent and lawful character of such relationship and of the legitimacy of children which are the fruit of such union and in no branch of the law is the presumptive rule more rigidly enforced. Even where the relation in its inception was meretricious, and although there was no proof of any ceremonial marriage or other contract of marriage thereafter, yet, as the parties continued to cohabit together, and certain declarations made * * * it was held that a presumption of marriage subsequent to the commencement of

the illicit relation would be presumed, and that a finding of a subsequent contract of marriage between the parties would be upheld, although there was no direct proof establishing the same."

"Also, where it is admitted that the cohabitation of the parties is illicit in its origin, the presumption is that it so continues and before it can be characterized as a lawful relation proof is required of such acts and circumstances as indicate that the relation has ceased to be illicit and become matrimonial."

The case above cited quotes Judge Van, in *Gall v. Gall*, 114 N. Y. 109, as saying upon this subject: "It is sufficient if the acts and declarations of the parties, their reputation as married people and the circumstances surrounding them in their daily lives, naturally lead to the conclusion that, although they began to live together as man and mistress, they finally agreed to live together as husband and wife."

Applying the rule above quoted to the case before me, what is the logical conclusion from the evidence adduced?

It is undisputed that the relation between the petitioner and decedent was meretricious in its inception. Terwilliger had been married several years to one Mary Moore, lived with her and had children by her; they resided on a small place owned by Terwilliger, near the village of Madalin; in 1892 they mutually agreed in writing to live separate and apart, and Terwilliger left his home and commenced living openly with Letitia Minkler; in 1894 the child Iris was born, the offspring of Alonzo and Letitia. In 1895, Mary, the lawful wife, died. Alonzo and Letitia then moved upon his place and continued to live there together until his death. During all these years she was true and faithful to him. Many witnesses were called on each side to testify as to the acts and declarations of the parties. All the testimony that was adduced showed that they lived there as man and wife. They held themselves out and were generally reputed in the neighborhood to be husband and wife; and many

witnesses testified to the fact of his addressing and speaking of her as his wife, on many occasions, since 1895 down to the time of his death. The evidence of cohabitation and repute, it seems to me, is most satisfactory and complete. Therefore, their reputation as married people, their acts and declarations, and the circumstances surrounding them in their daily lives, naturally lead to the conclusion that, although they began to live together as man and mistress, they finally agreed to live together as husband and wife. Before the death of the wife, Mary, no contract could exist; but, when that occurred, a change in the character of relation of these people could have taken place, and, I believe, did take place, from illicit to matrimonial. No better or more conclusive evidence, indicating a purpose thenceforth to make their relations matrimonial, can well be conceived than the documentary evidence introduced by the petitioner in the form of an attempted testamentary disposition of his property by descent and a paper purporting to be the family record, both proven to be in his handwriting. In the paper writing, signed by decedent, which he designates as his last will and testament, and which remained unexecuted, and which was prepared within a year previous to his death, he uses the following language: "First, I give and bequeath to my wife, Letitia the use of property which I possess * * * after her death, then shall my son Iris Terwilliger take full possession," etc., "as his father's desire." And in the family record he wrote "Alonzo W. married Mary Moore, Letitia Minkler." These two documents, to my mind, point clearly to the conclusion that decedent considered Letitia his wife and Iris his lawful son, and desired the world to so understand and consider their relations as man and wife from the time of the death of the wife Mary. Though no ceremonial marriage has been claimed or established, I find here all the requisites to constitute a valid marriage between them; for the proof shows actual cohabitation as husband and wife, acknowledgments, declarations (verbal and written), conduct,

repute and reception among neighbors. The present administrators lay great stress upon the testimony given by their witnesses to the effect that Letitia had said, a short time previous to the death of Alonzo, that "they were not married and that she requested some of them to intercede and have a ceremony performed," claiming that this precludes the idea of any contract of marriage between the parties. I do not so view it. Assuming the testimony to be true, she only said and did what she thought necessary to be done, before Alonzo died, in order to make their union legal, not knowing and not being informed that their common-law marriage, entered into prior to January 1, 1902, was just as legal and binding as though a civil or religious ceremony had been performed. My conclusion, therefore, is that Letitia was the lawful wife of Alonzo W. Terwilliger and his widow, and entitled to administer upon his estate, and Iris his legitimate son, and that an order be entered removing Hattie Moore and John L. Teats as administrators, and revoking their letters, and appointing Letitia Terwilliger administratrix upon her duly qualifying as such.

Decreed accordingly.

Matter of the Estate of MARGARET BARRETT, Deceased.

(*Surrogate's Court, Dutchess County, May, 1909.*)

WILLS—INTERPRETATION—DISPOSAL OF THE ENTIRE ESTATE: EFFECT OF DEATH, UNCERTAINTY OR INVALIDITY OR INCAPACITY OF LEGATEES OR DEVISEES—EFFECT OF DEATH OF BENEFICIARY IN LIFE OF TESTATOR—OF LEGATEE OF SHARE IN RESIDUE: DISPOSAL OF LAPSED OR VOID DEVISES OR REQUESTS, OR OF OTHERWISE UNDISPOSED PROPERTY—LAPSED, VOID OR INEFFECTUAL GIFTS.

A legacy, which lapses by reason of the death of the legatee before the testatrix, goes into the residuum of the estate and inures to the

benefit of each of the residuary legatees capable of taking at the death of the testatrix, share and share alike, and one of her next of kin, as such, has no interest in the lapsed legacy.

Where testatrix gave all the rest and residue of her estate, except a small amount otherwise specifically bequeathed, to the four brothers of her deceased husband, by name, share and share alike, the share of her estate which would have gone to one of said brothers had he survived the testatrix did not pass to the surviving residuary legatees under the will but must be distributed among the next of kin of the testatrix as property undisposed of under her will.

Affirmed 132 App. Div. 134.

Application for a compulsory accounting.

Walter Farrington, petitioner, in person; Palmer & Fagan, for executor.

HOPKINS, S.—Margaret Barrett, late of East Fishkill, died May 30, 1907, leaving a will which was duly admitted to probate by the surrogate of this county September 23, 1907; and on that day letters testamentary were issued to John J. C. Barrett, the executor named therein.

Walter Farrington, who is conceded to be one of the next of kin of the deceased, presents a petition to this court, asking for a compulsory accounting of the executor, and for a distribution of the estate to the legatees named in the will; and for a decree directing the distribution of a general legacy which had lapsed by reason of the death of the legatee during the lifetime of the testatrix, and a residuary legacy which had lapsed by reason of the death of the residuary legatee during said time, amongst the next of kin of said deceased. Twelve months having elapsed since letters testamentary were issued to the executor, the petitioner is entitled to an accounting, provided he is in any way interested in the funds of the estate. His interest, therefore, depends upon a construction of two clauses of the will of said deceased, which will be taken up separately.

Under the second clause of said will, the testatrix made the following bequest: "Second. I give and bequeath to my brother, Peter F. Mead, the sum of one thousand dollars." Said Peter F. Mead having died during the lifetime of said testatrix, the question arises as to what becomes of this legacy.

In consequence of the death of Peter F. Mead during the lifetime of the testatrix, the legacy lapses; and, under the general rule of law applicable to general legacies which may lapse or may be invalid for any reason, such a lapsed legacy becomes a part of the residuary estate, in all cases where the testator has made such provision.

It appears that said testatrix created a general residuary clause in her will giving to persons therein named all the rest and residue of her property after the payment of the general legacies to certain legatees named therein.

The general proposition of law is that a general residuary bequest of personal property carries to the residuary legatee, not only such estate and such interest therein as the testator did not attempt to dispose of by other provisions of his will, but every part of his property which lapses or otherwise is not effectually bequeathed and disposed of to others. *Matter of Benson*, 96 N. Y. 499; *Moffett v. Elmendorf*, 152 id. 475; *Langley v. Westchester Trust Co.*, 180 id. 326; *Leggett v. Stevens*, 185 id. 79.

Therefore, it is my conclusion that the legacy to Peter F. Mead, which lapsed by reason of his death before the testatrix, goes into the residuum of the estate and inures to the benefit of each of the residuary legatees capable of taking at the death of the testatrix, share and share alike, and that the petitioner herein, said Walter Farrington, has no interest whatever in such legacy.

The second question involved in this matter arises from the fact that Isaac D. Barrett, one of the residuary legatees, died in the lifetime of the testatrix, and a construction of the re-

siduary clause of said will is necessary to ascertain what becomes of his share, and whether his share passes to the surviving residuary legatees or passes to the next of kin as property undisposed of by the will. The residuary clause in said will reads as follows: "Eighth. I give and bequeath unto Simeon Barrett, Moseman Barrett, Isaac D. Barrett, Wright Barrett, all brothers of my deceased husband, John Barrett, all the rest and residue of my property to share and share alike, except the sum of three hundred dollars, which I give and bequeath unto Louisa Ostrom, wife of Richard Ostrom, Sarah Miles, Harriet Miles, the said sum of three hundred dollars to share and share alike."

The petitioner contends that the legacies were intended to go to those four persons in equal shares as tenants in common, and that, Isaac D. Barrett having died during the lifetime of said testatrix, his one-fourth share passes to the next of kin of said deceased, and not under the will; but the contention made by the executor is, that, under the language of the residuary clause, it was the intent of the said testatrix to have the four people named in said clause take the residuary as joint tenants; and, in such case, the three surviving residuary legatees would take the share of the one who died; in other words, the executor contends that the gift under the residuary clause was to a class and not to the individuals.

Whether a devise or bequest in a will is to a class or to individuals as tenants in common must depend upon the language employed by the testatrix in making the gift. All the provisions of the will may be consulted, and sometimes aid may be sought from the situation and relation of the parties. In this case, there is nothing in the will outside of the residuary clause itself that throws any light on this question; and I have not been able to find in any of the cases cited any attempt to define or formulate with much accuracy the language or circumstances necessary to constitute a gift to a class. Perhaps, from

the nature of the question, it is impossible to lay down any general rule or to do more than to determine every case upon its own facts and to construe every will with reference to the language employed by the testatrix, and the surrounding circumstances. The language and the circumstances are so seldom identical that it is not often that one case can be determined upon the authority of some other case or class of cases. But there are some principles and canons of construction recognized by all authorities which, when applied to the particular case, will ordinarily enable the courts to arrive at a reasonable and just conclusion.

When stated and applied to this case, it will be seen that there will be little difficulty in determining the nature and character of the gift to Simeon Barrett, Moseman Barrett, Isaac D. Barrett and Wright Barrett, whether collectively as a class, or distributively as tenants in common.

In legal contemplation a gift to a class is a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportion, the share of each being dependent for its amount upon the ultimate number. *Matter of Kimberly*, 150 N. Y. 90-93; *Matter of Russell*, 168 id. 196; *Langley v. Westchester Trust Co.*, 180 id. 326.

Here, in this case, the number of persons was certain at the time of the gift, the share each was to receive was also certain, being one-quarter of the residuary estate, and was in no way dependent for its amount upon the number who should survive; and, therefore, this case is not within the principle invoked by the executor and to which he applies the decision in *Hoppock v. Tucker*, 59 N. Y. 202, and in which case the court says that their conclusion is arrived at with some hesitation.

The executor also contends that it was the intention of the testatrix, by the language employed in the residuary clause, to give the residue of her property to the four people named

therein as a class, and not as individuals, because, after naming them, she added the words, "all brothers of my deceased husband, John Barrett," and that thereby she intended to designate them by such reference to be a class, and to take the residuary property as if their names had not been mentioned in such will, but the clause had read "I give and bequeath unto all brothers of my deceased husband, John Barrett, all the rest and residue of my property share and share alike."

I cannot agree with this contention, as it seems to me that the words, "all brothers of my deceased husband, John Barrett," following the names of the individuals in the residuary clause, were merely descriptive and inserted therein for the purpose of identifying each particular Barrett, in order, perhaps, to distinguish them from other Barretts of the same name, or in the same locality.

If the testatrix had intended to make her gift to these four people as a class, it would have been a very simple and easy matter to have inserted in her will a reference, that all the residuary legatees were "all the brothers of her deceased husband;" and such language might have then been construed as intending a class including all the brothers of her said husband without naming them; and I conclude that, from the language employed in the residuary clause in this will, she intended these four people to take as individuals and as tenants in common, and not as joint tenants.

The legatee died in the lifetime of the testatrix and was related to her deceased husband, and she must be presumed to have known of his death. The will spoke at her death and then first took effect. It must be treated as though the testatrix had made no disposal of the portion bequeathed to the residuary legatee Isaac D. Barrett, and that she had intentionally died intestate as to such portion. I, therefore, conclude that the portion or share of the estate which would have gone to Isaac D. Barrett, had he survived the testatrix, does not pass to the sur-

viving residuary legatees under the will, but must be distributed among the next of kin of the deceased as property undisposed of under the will; and, therefore, that the petitioner is entitled to a share in said portion and to an accounting by the executor.

Let an order be entered directing the executor to account, the time and manner to be fixed by consent or upon three days' notice by either party.

Decreed accordingly.

Matter of the Judicial Accounting of HENRY T. CAREY, FREDERICK GORE KING and JOHN C. O'CONOR, as Trustees Under the Last Will and Testament of GEORGE WINTHROP THORNE, Deceased.

(Surrogate's Court, Suffolk County, May, 1909.)

EXECUTORS AND ADMINISTRATORS—DISTRIBUTION AND DISPOSAL OF PERSONAL ESTATE—COMPUTATION AND ADJUSTMENT OF INTERESTS AND DISCHARGE THEREOF: COMPUTATION AND APPORTIONMENT OF INCOME: FUNDS, ASSETS AND SECURITIES FOR DISTRIBUTION AND TO PAY LEGACIES—WHAT IS INCOME.

TRUSTS—THE BENEFICIARY, HIS ESTATE, RIGHTS AND INTEREST—RIGHTS OF BENEFICIARY OF INCOME—WHAT IS INCOME.

Where by the will of a testator, who at the time of his decease was the owner of one hundred shares of the common stock of a corporation, his testamentary trustees were directed to pay to a certain person an annuity from the income of his estate and make immediate payment of the entire surplus of the income to another person, and several years after the death of the testator, under a plan to increase the capital stock of the corporation, the holders of the outstanding common stock had the right to subscribe at par, for cash, an amount of the new increased common stock equal to forty per cent. of the outstanding stock held by them, respectively; and, under an agreement by which every stockholder signing the same covenanted and agreed, but only on payment of the extra cash dividend, to so subscribe and pay for the new stock, the cash dividend so paid to be applied in payment of such subscription; and where the testamentary trustee received, under such agreement, a certificate for forty shares

of the new common stock, said shares are no part of the capital of the trust fund but profits in excess of the annuity and belong to the legatees of the balance of the income, as, no matter how said stock was designated on the books of the corporation, it represented actual profits and income from its business and it was from such fund that said dividend was paid; and the mere fact that the stockholders used the dividends so received, under an agreement with the corporation, in purchase of new stock in it, did not destroy its character as an actual *bona fide* dividend, payable from the profits and income of the corporation's business.

Proceeding upon the judicial accounting of testamentary trustees.

Gilbert M. Speir, for trustees; Evarts, Choate & Sherman, for Helene, Lady Leigh.

BELFORD, S.—Under the will of the deceased, certain property is devised and bequeathed to the above-named trustees; and the income is to be disposed of as follows: "To pay to Marie Valadier of the city of Paris, in France, the sum of ten thousand dollars (\$10,000) in each and every year for and during the term of her natural life in equal quarter yearly payments, commencing from the date of my death, such payments to be made to the said Marie Valadier upon her own individual receipt without power on her part of assigning, anticipating or otherwise alienating such annuity, and upon the further trust to pay over the balance of the income of my said residuary estate to Helene Leigh, wife of the Hon. Dudley Leigh, to her own use absolutely."

The testator had at his death, on February 1, 1904, 100 shares of the common stock of the Niles-Bement-Pond Company of the par value of \$100 each. These shares of stock were received by the trustees and have ever since been held by them as a part of the capital of the trust estate. On or about October 1, 1906, the Niles-Bement-Pond Company issued a state-

ment to the common-stock holders of the company, which statement embodied a plan to increase the capital stock of the said company by an amount of \$3,500,000, and the terms under which the then holders of the common stock could participate in this increase. This statement contains the following: "2. That a dividend, to be known as an extra dividend, and to amount to forty (\$40) dollars in cash upon each share of the common stock now outstanding, shall, upon declaration thereof by the Board of Directors, be paid and distributed, from and out of the accumulated surplus of the company, to and among the holders thereof. 3. That holders of the outstanding common stock shall have the right to subscribe, take and pay for, at par, for cash, an amount of the new and increased common stock equal to forty (40) per cent. of the outstanding common stock held by them respectively, as stated opposite their signatures hereto. Every stockholder signing this agreement covenants and agrees, but only on payment of said extra cash dividend of forty (\$40) dollars per share, to so subscribe and pay for the above mentioned amount of said new common stock; and that, upon payment of the extra cash dividend above referred to, the money so paid shall be applied in payment of such subscription." Under this agreement a check for \$4,000, being forty per cent. on the 100 shares of the stock of this corporation held by the trustees above named, was received by the attorneys named in their proxy, who indorsed and delivered it to the corporation; and, on or about January 2, 1907, the trustees received a certificate for forty shares of new common stock of said company of the par value of \$100 each. And the question presented to the court for determination at this time is whether this is properly added to the trust estate as a part of the capital of the trust, or whether it is income and, as such, should be paid to Lady Leigh as a part of the surplus of income over and above the \$10,000 provided for the annuitant, Marie Valadier.

The attorneys for the respective parties herein have presented very able and exhaustive briefs upon the question presented. As to whether or not the forty shares of stock so received by the trustees shall be considered principal or income, is dependent upon two considerations, in the main: first, what provision, if any, the testator has made for any such contingency as this; what, if anything, he has said with reference to any extra dividends upon any portion of his estate; and secondly, what is the origin of the dividend itself? Whence does it come? How was it regarded by those who issued it?

As to the first of these questions it must be remarked that a careful reading of the will of Mr. Thorne fails to reveal any expressed provision that might apply to anything in the nature of extra dividends upon any portion of his estate. This will simply directs that the trustees shall pay an annuity of \$10,000 to Marie Valadier and that the entire surplus, whatever it may be, shall be immediately paid to Lady Leigh. That these forty shares were considered by the corporation itself to be an extra dividend, I feel constrained to hold, unless the language of paragraphs two and three of the statement issued by the company are to be taken as meaning exactly the opposite of what they say. Of course, I am aware of the rule that this court must determine for itself from all the attending circumstances whether or not the forty shares is in the nature of an extra dividend, and that the mere *dictum* of the corporation itself would not of necessity be conclusive upon this court. But, where the language is so plain and so free from ambiguity as it is in this case and where the manifest purpose of the dividend was simply to furnish the holders of the common stock, at least to the extent of \$2,000,000, with a fund with which they could pay for the extra issue, it seems to me that the question, under all the decisions in this State, admits of but one solution.

In the case of *Lowry v. Farmers' Loan and Trust Company*, 172 N. Y. 137, the court lays down the rule: "The transac-

tion, through which the property of the corporation is being distributed in the extraordinary form of a stock dividend, is to be looked into; in order that its true nature may appear and that a determination may be reached, whether capital, or an accumulation of profits on the capital, is being divided among the stockholders. While the corporate action may not be necessarily conclusive upon the court, with reference to the question, if it is based upon facts, and is not purely arbitrary, it will, and should, be controlling." Now, was the action of this company arbitrary in declaring this dividend? It would hardly seem so from the statement which they issued. It had a surplus; it had a very large surplus. It stated that it believed that the common-stock holders were equitably entitled to a portion of this surplus, and it actually paid it in cash.

To my mind this leaves little, if any, question as to the character of the fund in question. It is contended by the trustees that there has been no distribution and no change in substance, but only a change in form, resulting in a capitalization of surplus and a dilution of the common stock of the company, so that the 140 shares which the trustees held after the issue of the new stock was of no extra value and represented the same proportionate interest in the property of the company as the hundred shares held by the company prior to such increase. But I am not impressed by this reasoning. To me it seems quite immaterial that there may have resulted this increase in the stock by a capitalization of the income or the profits. The capital test is, has there been a distribution of income and profits, or has there been a division of capital? Of course, the latter would not be permitted; and, if the distribution in this case was not made from the income and profits of the business, then I am at a loss how to characterize the transaction. It is true that this dividend was manifestly paid from that portion of the surplus income which had been reserved as working capital. But, no matter how it was designated on the books of

the company, it represented actual profits and income from the business of this corporation, and it was from this fund that this dividend was paid; and the mere fact that the common-stock holders used the dividend so received, under an agreement with this company, in the purchase of new stock in the company, did not destroy its character as an actual *bona fide* dividend, payable from the profits and income of the business.

I, therefore, decide that the forty shares of stock received by the trustees from the Niles-Bement-Pond Company are not a part of the capital of the trust fund, and that they were profits in excess of the \$10,000 annuity payable to Marie Valadier, and that they belong to Lady Leigh.

Decreed accordingly.

Matter of the Estate of THOMAS MCGEE, Deceased.

(*Surrogate's Court, Oneida County, May, 1909.*)

EXECUTORS AND ADMINISTRATORS—THE COLLECTION AND REDUCTION TO POSSESSION OF PROPERTY OR CLAIMS OF ESTATE—REMEDIES AND PROCEDURE—DISCOVERY AND SURRENDER OF ASSETS—DISMISSAL.

Where, upon a proceeding taken by an administrator under section 2707 of the Code of Civil Procedure for the discovery of property alleged to belong to the estate, each witness upon the examination claims title to the property in his or her possession and disputes the administrator's right thereto, the proceeding must be dismissed, unless claimants consent that the surrogate determine the rights of the parties.

See 72 Misc. 304.

Proceeding by an administrator for the discovery of estate property under section 2707 of the Code of Civil Procedure.

Curtin & Lee (William F. Dowling, of counsel), for administrator.

SEXTON, S.—This is a proceeding instituted by the administrator of this estate for the discovery of estate property under section 2707 of the Code of Civil Procedure. No answer in writing to the petition was filed. Section 2710 of the Code of Civil Procedure provides: "If the facts admitted by the witness show that he is in control of property to whose immediate possession the petitioner is entitled, the surrogate may decree that it be delivered to the petitioner. If the witness admits having control of the property, but the facts as to the petitioner's right are in dispute, the proceeding shall end, unless the parties consent to its determination by the surrogate, in which case it shall be so determined."

Several of the articles of personal property specified in the petition were traced into the possession of some of the witnesses who testified on this hearing. Each witness claimed the property in his or her possession on the ground that it has been given to him or her by the deceased in his lifetime, or that it had been purchased with the witness' earnings. Upon the evidence the right of the administrator to any of the items of personal property set out in the petition was disputed.

It is not necessary that an answer in writing should be filed by any claimant in order to place in dispute the petitioner's right to the property, as the provision in section 2710 of the Code of Civil Procedure, for the determination of the proceedings where a dispute arises as to the ownership of property, refers to a dispute developed upon the examination of the claimant, and not a dispute which he creates by allegations in an answer to the petition for his examination. *Matter of Gick*, 49 Misc. Rep. 32; *affd.* 113 App. Div. 16.

The facts as to the petitioner's right to the property in question being in dispute upon the evidence, and the parties interested not having consented that the surrogate determine these questions, the proceeding is dismissed.

Ordered accordingly.

Matter of the Probate of the Alleged Last Will and Testament
of FRANCES ANNA ESSIG, Deceased.

(*Surrogate's Court, Kings County, June, 1909.*)

**SURROGATE'S COURT—PROCEDURE AND REVIEW—ORDERS AND DECREES—OFFER
ATION AS BAR OR AS CONCLUSIVE EVIDENCE—PROBATE AND REVOCATION
OF PROBATE—NOT CONCLUSIVE ON APPLICATION FOR PROBATE OF ANOTHER
PAPER EXECUTED ABOUT SAME TIME.**

The adjudication that one of two papers made within a few minutes of each other should not be admitted to probate as the will of the person subscribing it does not constitute a former adjudication of the question of admitting the other paper to probate.

Proceeding upon the probate of a will.

Peter J. McGoldrick (Bruce R. Duncan, of counsel), for proponents; Henry T. Hooker, for contestants.

KETCHAM, S.—Motion that probate be refused is denied.

The findings and decree in the proceeding brought for the probate of a paper other than the one now propounded do not constitute a former adjudication.

True, the two papers were made within a few minutes of each other, and it is a stretch of one's credulity to believe that the earlier one was safe from the circumstances which destroyed the second. But the determination as to the second was not a determination as to the other. It could not be, and the findings, so far as they contain a conclusion that the paper not offered for probate in the former proceeding was void, were unnecessary to the decision.

"A judgment is conclusive upon the parties thereto only in respect to the grounds covered by it, and the law and facts necessary to uphold it; and, although a decree, in express terms, purports to affirm a particular fact or rule of law, yet if such fact or rule of law was immaterial to the issue, and the controversy did not turn upon it, the decree will not conclude the parties in reference thereto." *Woodgate v. Fleet*, 44 N. Y. 1.

Decreed accordingly.

Matter of the Appraisal under the Acts in Relation to Taxable
Transfers of the Property of MARGARET EPPIG, Deceased.

(Surrogate's Court, Kings County, June, 1909.)

CHARITIES—REQUISITES AND VALIDITY IN GENERAL: WHAT CONSTITUTES
CHARITABLE USE: CERTAINTY AS TO BENEFICIARY—EFFECT OF CHAPTER
701, LAWS 1893.

TRUSTS—PURPOSES FOR WHICH EXPRESS TRUSTS ARE VALID—SERVICES TO BE
PERFORMED AFTER DEATH OF GRANTOR—MASSES.

A direction to executors to pay and expend certain sums from time
to time in their discretion for the expense of Roman Catholic masses
for the repose of the souls of the testatrix and her parents is a gift to
the executors for a religious use upon a valid and effectual trust and
taxable at the rate of five per cent.

Appeal from the report of the appraiser fixing and assessing
the transfer tax.

William W. Wingate, for State Comptroller, appellant; Fer-
nando Solinger, for executors, respondents.

KETCHAM, S.—The State Comptroller appeals from the ad-
justment of the transfer tax at one per cent. instead of five per
cent. on the sums mentioned in the following paragraphs of
decedent's will:

"Second. I direct my executors to pay and expend the sum
of Two thousand (\$2,000) Dollars, the same to be applied by
them from time to time in their discretion to the payment of the
expense of Roman Catholic Masses to be procured by them to
be said for the repose of my soul.

"Third. I direct my executors to pay and expend the sum of
Five hundred (\$500.00) Dollars, the same to be applied by
them from time to time in their discretion to the payment of
the expense of Roman Catholic masses to be procured by them

to be said for the repose of the souls of my deceased parents, John Adam Schwint and Elizabeth Schwint."

It is the claim of the Comptroller that these paragraphs contain gifts in trust for a religious use, which may be effectuated under chapter 701 of the Laws of 1893, notwithstanding the indefiniteness and uncertainty of the beneficiaries thereunder.

The decedent died on January 2, 1909.

If a gift can be implied, the statute cited places the provisions of this will upon the same footing as to validity as if the gift were in trust to pay the sums indicated to a clergyman or religious corporation designated by name and thereby to procure the masses to be said.

"No gift, grant, bequest or devise to religious, educational, charitable or benevolent uses, which shall, in other respects be valid under the laws of this State, shall or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same." Laws of 1893, chap. 701.

A bequest for the saying of masses for the repose of the dead is a gift for a religious use. A gift in trust may be implied. Where "the duties imposed are active and render the possession of the estate convenient and reasonably necessary, the executors will be deemed trustees for the performance of their duties, to the same extent as though declared to be so by the most explicit language." *Ward v. Ward*, 105 N. Y. 68; *Tobias v. Ketchum*, 32 id. 319; *Robert v. Corning*, 89 id. 225.

It is to be observed that the executors are not directed merely to pay these sums to an unnamed beneficiary. The direction is that the executors by such payment, and as an accompanying duty, shall procure the masses to be said. It is also required that the executors shall exercise their discretion as to the application of the sums bequeathed. There is no discretion as to whether or not these sums shall be used. The direction as to their use is absolute; but the duty is laid upon the executors to

determine, from time to time, what portion of the fund shall be at any given time devoted to the masses and over what period these disbursements shall spread. To see to it that the purposes of the payment shall be fulfilled and, as an incident thereto, to control the rate and progress of the payment, is an active and continuing responsibility which cannot be effectually discharged without possession of the gift.

It seems, therefore, that there is a gift to the executors for a religious use upon a valid and effectual trust, and the transfer should be taxed at the rate of five per cent.

The order, so far as appealed from, should be reversed, and direction should be made in accordance with these views.

Decreed accordingly.

Matter of the Transfer Tax Upon the Estate of SIMON ROTHSCHILD, Deceased.

(Surrogate's Court, Kings County, June, 1909.)

**TAXES—INHERITANCE AND TRANSFER TAXES—ASSESSMENT—APPRAISAL—
DEDUCTION OF ADMINISTRATION EXPENSES—DEDUCTION OF COMMISSIONS
OF REAL ESTATE BROKER.**

Where legacies are charged upon real estate and the necessity for the sale of the lands is clear, commissions of a broker upon such sale should be allowed as a necessary expense of administration upon the appraisal of the estate for the transfer tax.

Appeal from the report of an appraiser fixing and assessing the transfer tax.

Leon Kronfeld, for the executrix; William W. Wingate, for the State Comptroller.

KETCHAM, S.—No ground appears upon which the appraiser's estimate of the value of the real estate can be disturbed.

The specific charge of the legacies upon such real estate, together with the express power to make deeds to carry into effect the provisions of the will, implies a power of sale.

The sale, if made, will be an act of administration, and the necessity for the sale is clear. Hence, as to the lands devised, the only interest which passes by the will, when the devise is subject to a power which is sure to be exercised, is the right to receive so much of the proceeds of sale as shall remain after the payment of legacies, debts and expenses incident to the sale.

If commissions are to be paid to a broker for procuring a purchaser, then, unless there is a corresponding deduction, the tax will be levied upon a sum which by the will cannot reach the beneficiary. Such commissions are a proper expense, and the executrix swears, without contradiction, but in somewhat uncertain language, that in this case the commissions will be included in the expenses of the sale necessarily to be paid.

The proceedings should be remitted to the appraiser to take such further proof as may be offered, and upon the whole case to allow the amount of broker's commissions upon the sale, if upon all the proofs it shall appear that they are actually to be paid.

Proceeding remitted to appraiser.

Matter of the Appraisal Under the Transfer Tax Acts of the
Property of JACOB L. VAN PELT, Deceased.

(*Surrogate's Court, Kings County, June, 1909.*)

TAXES—INHERITANCE AND TRANSFER TAXES—ASSESSMENT—APPRAISAL—
DEDUCTION OF ADMINISTRATION EXPENSES—DOUBLE COMMISSIONS TO
EXECUTORS.

Where an estate amounts to less than \$100,000 at the death of a testator but more than that amount comes to the hands of the executors by the subsequent accrual of interest, each executor is entitled to full commissions, and separate commissions should be deducted in appraising the estate for the transfer tax.

See Note on Bequest for Masses *ante*.

Appeal from an order fixing the transfer tax.

Furst & Furst (Arnold S. Furst, of counsel), for the executors; William W. Wingate, for the State Comptroller.

KETCHAM, S.—Upon an appeal taken from the order fixing the transfer tax, the ground of appeal is that, in the adjustment of the tax, deduction was made of a single commission to executors instead of a commission to each of three executors.

The estate at the time of the death was of the value of \$98,621.33, but when the executors received their letters it had been increased by the accrual of interest to more than \$100,000.

No doubt, for the purpose of the transfer tax, the estate must be valued as of the time of death; but whether each executor shall receive a full commission is to be determined by the value of the estate which they shall have administered.

Under familiar methods of estimating deductions, it must be found that a triple commission is among the prospective expenses of this administration. The two additional commissions at the estimate made by the appraiser would be \$2,299.52.

The present order would make the legatees pay a tax upon this sum as an amount which passes to them under the decedent's will, when, as must be seen, it will never reach them.

The order appealed from should be modified accordingly.
Decree modified.

**Matter of the Transfer Tax on the Estate of FERRUCCIO A.
VIVANTI, Deceased.**

(Surrogate's Court, New York County, June, 1909.)

EXECUTORS AND ADMINISTRATORS—COLLECTION AND REDUCTION TO POSSESSION OF PROPERTY OR CLAIMS OF ESTATE—PROPERTY CONSTITUTING ASSETS—ESTATES IN REAL PROPERTY—LEASES SO LONG AS RENT IS PAID. TAXES—INHERITANCE AND TRANSFER TAXES: PROPERTY AND INTEREST SUBJECT TO TAX—PROPERTY SITUATED IN ANOTHER STATE: ASSESSMENT—APPRAISAL—OF PARTICULAR PROPERTY—GOOD WILL OF BUSINESS.

The good will of a business carried on by a decedent at the time of his death is a taxable asset of his estate; but, where the business is one that depends for its success upon the confidence which its patrons have in the personal skill and integrity of those who carry it on, it should not be estimated above the amount the decedent actually realized from it during the last year of his life with his capital and personal assistance.

Leases of lands in Japan by the Japanese government at a fixed rent so long as the rent shall be paid are not assets and the interest of a decedent as tenant thereunder is not taxable under the laws relating to taxable transfers.

Reversed 138 App. Div. 281.

Appeal from the report of an appraiser fixing and assessing the transfer tax.

John S. Jenkins (Edgar N. Dollin, of counsel), for State comptroller; W. M. Rosebault, for executor.

THOMAS, S.—If, as both of the parties to this appeal appear to assume, Mr. Greenbaum upon his admission as a partner in the firm of Vivanti Brothers acquired the right and assumed the

obligation to continue to carry on the business of the firm for at least ten years after the death of the decedent, paying for the good will thus acquired a portion of his annual profits during such period, this was a transaction *inter vivos*, and, if any advantage accrued to Mr. Greenbaum because of it, the value of that advantage was not a taxable asset of the decedent. As I construe the documents I cannot agree that any such bargain was made between the decedent and Mr. Greenbaum, or that he acquired by virtue of any contract with the decedent a right, either absolute or contingent, to the good will or to the use of it, and this construction appears to be the one adopted by the parties, for the contract under which Mr. Greenbaum is carrying on a business similar to that of the old firm is one made between him and the widow, and differs substantially in its terms from the contract with Mr. Tegner, to whose rights Mr. Greenbaum is supposed by counsel to have succeeded. The good will of the firm of Vivanti Brothers was, however, an asset in which the estate of the deceased partner had an interest, though not an absolute title to the exclusion of the surviving partner, and the value of this interest, which passed beneficially to the widow of the decedent, was properly taxable. The appraiser values this good will at \$59,088.21, and treats the whole of this value as an asset of the estate. The method of appraisal adopted by the appraiser would seem by the figures to have been to take the average annual profit of the firm for the four years preceding the decedent's death, to wit, \$39,392, compute fifteen per cent. of that amount as being the profitable profits which would hereafter be payable by Mr. Greenbaum under his contract with the widow, and multiply the result by ten, the number of years for which the contract is to continue. This method of computation ignores the fact that the nature of the business was that of brokers in silks, and was largely personal, depending much for its success upon the confidence reposed by vendors and purchasers of silks in the capacity and integrity of the persons acting as

such brokers, and that the decedent, who created the business, contributed to carrying it on, in addition to his own knowledge, skill and business reputation, at least \$125,000 in the way of capital, besides the credit arising from his large wealth. For all of this he demanded only sixty per cent. of the net profits of the firm for the last year of his life, and seventy-five per cent. for previous years. The business is now to be carried on by his former junior partner, without any capital from the estate, and the decedent's reputation is a mere memory. The present capital employed is contributed by a special partner, and amounts to only \$50,000. It is, of course, utterly impossible to estimate with any degree of accuracy the annual payments which will be made by Mr. Greenbaum under his contract, and I think that the interest of the decedent ought not to be estimated at any sum exceeding the amount actually received by the decedent as his share of the profits of the business for the last year during which it was conducted under his direction and with his capital and personal assistance, to wit, \$25,374. The valuation is, therefore, reduced to that figure.

The decedent's rights in certain lands in Japan were taxed as personal property. Each parcel of this land is represented by a lease from the Japanese government to the decedent or to the grantor of the decedent, his heirs, executors, administrators and assigns, at a fixed and stipulated annual ground rent, to run as long as such ground rent shall continue to be paid, with the right to the lessee to transfer the lease or rights therein acquired to any person who is a citizen or subject of a country having a treaty with Japan. In the terms of our law these leases can perhaps be described as perpetual leases reserving rent. Under our law a perpetual lease of this kind is not an asset passing to executors or administrators, but is real property, which passes to the heir (Code Civ. Pro., § 2712; *Millard v. Mulling*, 68 N. Y. 345, 352), and it is real property within the definition of that term contained in chapter 18 of the Code of Civil Pro-

cedure relating to Surrogate's Courts. Code Civ. Pro., § 2514, subd. 13. In imposing transfer taxes we are administering a statute of this State, and if the rights of the decedent in these Japanese lands are, within the meaning of our law, real property situated in a foreign jurisdiction, the Transfer Tax Law furnishes us no authority for imposing the tax. If the nature of the property be determined according to the Japanese law, and if we are permitted to examine and rely upon the evidence of that law contained in the record, the result will be the same. It is by the rules furnished by one or the other of these bodies of law that the question is to be determined. *Savage v. O'Neil*, 44 N. Y. 298. On broader and perhaps less technical grounds the courts of this State should not be astute to impose a tax on interests in land situated within the limits of a foreign jurisdiction of a character which we in this State would regard as real property, in view of the fact that the lawmaking body of this State has carefully refrained from imposing any tax or charge upon real property outside the limits of this jurisdiction. The order must be reversed as to the tax upon the transfer of this Japanese real estate.

The ruling of the appraiser, refusing to deduct from the appraisal the value of the widow's dower right, is affirmed. *Estate of Henry I. Barbey*, N. Y. L. J., March 2, 1908, and cases cited.

The valuation of the properties Nos. 50 and 52 East One Hundredth street will be reduced to \$28,000 each, upon the evidence submitted.

As to the excess commissions, upon the stipulation filed their amount must be fixed at \$2,864.68, and a tax will be imposed thereon against the executor at five per cent. Tax Law, § 226. This sum is included in the valuation of the income of the life beneficiary, and there is consequently a double taxation. To avoid this the sum of \$2,864.68 must be deducted from the value of the property passing to such life beneficiary.

Settle order on notice.

In the Matter of the Transfer Tax upon the Estate of GEORGE W. CUMMINGS, Deceased.

(Surrogate's Court, New York County, June, 1909.)

TAXES—INHERITANCE AND TRANSFER TAXES—PROPERTY AND INTEREST SUBJECT TO TAX—PROPERTY SITUATED IN ANOTHER STATE—ASSETS DISTRIBUTED THEREUNDER—CLAIM OF DOMICILIARY ADMINISTRATION.

Where assets of a deceased person in California are distributed there under the intestate laws of that State pursuant to a decree which adjudges the decedent to have been a resident of that State and do not come to the hands of the executor in New York, they will not be taxed here; though by a subsequent decree in New York it is adjudged that the decedent was at the time of his death a resident of this State.

Appeal from an order fixing the transfer tax.

Turner, Rolston & Horan, for (executors) appellants; Alfred Yankauer, for State comptroller.

COHALEN, S.—Appeal from an order fixing the tax. The decedent made a will by which he appointed the Merchants' Loan and Trust Company of Los Angeles, California, his executor, as to so much of his property as was situated in that State. He appointed the Farmers' Loan and Trust Company of New York his executor as to so much of his property as was situated in this State. He died in 1904. Shortly after his death, a proceeding was brought in the Superior Court of Los Angeles, California, for the probate of his will. That court decided that the decedent was a resident of the State of California; that certain provisions of the will creating trust funds were invalid, and that that part of the property which was located in California and designated in the will as constituting a part of the trust fund should be distributed to his next of kin, in accordance with the intestate laws of California. The property located in California

was subsequently distributed among decedent's next of kin, in the manner provided by this decree, and in the proportion prescribed by the intestate laws of California. In 1906 the Farmers' Loan and Trust Company, as executor in this State, commenced a proceeding in the New York Supreme Court for the construction of decedent's will. The court decided that the decedent was a resident of this State; that the provisions of his will attempting to create certain trust funds were invalid, and that such property should be distributed in accordance with the intestate laws of this State. In the proceeding instituted by the New York executor to appraise the estate, in accordance with the provisions of the Transfer Tax Act, the appraiser included in the taxable assets of the estate all the property of decedent which was situated in California, and which, under the decree of the Superior Court of Los Angeles, had been distributed among decedent's next of kin. The executor contends that the transfer of that property is not taxable here and has appealed from the order entered upon said report. Section 220 of the Transfer Tax Law provides: "A tax shall be and is hereby imposed upon the transfer of any property * * *. first, when the transfer is by will or by the intestate laws of this State from any person dying seized or possessed of the property while a resident of this State." Before the tax can be imposed there must be a transfer of the property, either by will or by the intestate laws of this State. Assuming, in accordance with the decision of the New York Supreme Court, that the decedent was a resident of this State, if that part of his personal property which was situated in California passed or was transferred to his next of kin by virtue of the intestate laws of this State, such a transfer would be taxable here. *Matter of Swift*, 137 N. Y. 77. But, at the time the New York court decided that he was a resident of this State, the property located in California had already been distributed under and by virtue of a decree of a court of competent jurisdiction in that State and in the propor-

tion prescribed by the intestate laws of that State. The property having already been actually transferred under the intestate laws of the State of California, there was no property there which could be transferred under the intestate laws of this State. The theory that the property passed under the intestate laws of this State must give way to the fact that it was actually transferred under the intestate laws of the State of California. The Superior Court of Los Angeles being a court of competent jurisdiction, its decree was entitled to full faith and credit in this court. *Tilt v. Kelsey*, 207 U. S. 43. Therefore, as the decedent's property in California was not transferred to his next of kin by virtue of the intestate laws of this State, the courts of this State have no jurisdiction to impose a tax upon the transfer of such property. The order fixing the tax should be reversed and the report remitted to the appraiser for the purpose of excluding from the taxable assets of the estate the value of decedent's property situated in California.

Decreed accordingly.

Matter of the Final Judicial Settlement of the Accounts of
ADELBERT HAIGHT, as Executor, Etc., of DANIEL HYATT,
Deceased.

(Surrogate's Court, Dutchess County, June, 1909.)

WILLS—INTERPRETATION AND CONSTRUCTION—DESIGNATIONS AND DESCRIPTIONS OF PERSONS, OBJECTS AND PURPOSES—RULES AND IMPLICATIONS—WORDS DESCRIPTIVE OF A CLASS—"NIECE" AS NOT INCLUDING BROTHER'S ADOPTED DAUGHTER.

Where a testator gave the residue of his estate to his "nephews and nieces (children of my brothers and sister), share and share alike," it is to be presumed that he intended nephews and nieces by birth only and not an adopted daughter of a deceased brother, in the absence of knowledge upon his part of the fact of such adoption.

Proceeding upon the final judicial settlement of the accounts of an executor.

Charles Morschauser, for executor; Harry Barker, for Hudson River State Hospital; Allison Butts, for Lucy Barlow, claimant; John F. Ringwood, special guardian, for Albert Hyatt; Charles F. Bishop, for James H. DuBois; Henry E. Losey, for Francis E. DuBois; George Overocker, for State comptroller.

HOPKINS, S.—The question presented for determination in this matter is: Does Lucy Barlow, a legally adopted daughter of one Jonathan Hyatt, a brother of the testator, share in the distribution of the real and personal property of the testator, with his natural-born nephews and nieces, under the terms of the will? The provision of testator's will under which this controversy arises reads as follows: "Fourth. I give, bequeath and devise all the rest, residue and remainder of my estate, both real and personal to all my nephews and nieces (children of my brothers and sister), share and share alike."

At the time of Hyatt's death he had the following nephews and nieces related by blood, viz.: Fred, Bert and Mary Hyatt, children of his deceased brother James; and James H., Henry and Francis E. DuBois, children of his sister Mary. His brother Jonathan, who is still living, had no children, except an adopted daughter, Lucy Barlow, the claimant upon this accounting for a share of testator's residuary estate. In arriving at a decision I have disregarded all parol evidence, except that which relates to the testator's knowledge as to the fact of Lucy Barlow's adoption by his brother Jonathan, and have endeavored to draw from the language of the will, aided by such evidence and the circumstances surrounding the testator at the time of its execution, his intention as to who were to be objects of his bounty, and whom he desired to have his property, and

as to whether it was his intention to include or exclude her from participation in his estate. That the gift was to a class there is no dispute; that Lucy Barlow came within this class is disputed. As between foster parent and adopted child the statute gives the right of inheritance, each from the other (Dom. Rel. Law, § 64), and this right has been upheld in numerous cases. But this right has never been extended, by statute or by judicial interpretation, to the child to inherit from the collateral kin of the foster parent (*Kettell v. Baxter*, 50 Misc. Rep. 428), and, while this is not a case of intestacy, yet, the question of inheritance has much to do with determining the claimant's right under this will, in the light of the testator's knowledge of her relations to his brother. The law favors construction which will not tend to the disinheriting of heirs, unless the intention to do so is clearly expressed, so that the property will go to those who are related in blood to the testator, rather than to those who would take nothing from the testator as heir or next of kin in case of intestacy. *Scott v. Guernsey*, 48 N. Y. 106-120; *N. Y. Life Ins. Co. v. Vielle*, 161 id. 11.

It clearly appears that testator never recognized the existence of any artificial relation of parent and child between Jonathan and Lucy. In fact, he did not know that she was legally adopted, but understood and believed that she was not. In the light of his knowledge at the time of the preparation of the will and the incidents occurring at that time, it appears that he did not intend to give the claimant any portion of his estate, and that he was satisfied from the knowledge he possessed that the language of the will would exclude her as a legatee, and his property be divided among the children born to his "brothers and sister," as he evidently intended. I believe that when he desired his property to go to his "nephews and nieces" he intended those persons who held such relation by the operation of usually recognized relations in society, and that it would be contrary to the wish and intention of the testator for me to read

into the will any language or to draw therefrom any inference which would include the claimant within its provisions. It seems to me that had the testator intended Lucy Barlow to be one of his beneficiaries he would have expressly mentioned her as such, because the only natural inference that can be drawn of the state of mind of the testator at the time the will was executed is, that she would not take under its provisions, showing clearly to me that his express intention was to exclude her as a beneficiary.

My conclusion, therefore, is, that Lucy Barlow should be excluded in the distribution of this estate.

Let a decree be entered accordingly.

Decreed accordingly.

Matter of the Voluntary Judicial Settlement of the Account of Proceedings of JEANNETTE NELSON, as Executrix of WILLIAM B. NELSON, Deceased.

(Surrogate's Court, Greene County, June, 1909.)

EXECUTORS AND ADMINISTRATORS—RIGHTS AND LIABILITIES BETWEEN REPRESENTATIVE AND ESTATE—CLAIMS BY PERSONAL REPRESENTATIVES—EVIDENCE—SUFFICIENCY.

LIMITATION OF ACTIONS—REVIVAL OF OBLIGATION—ACKNOWLEDGMENT AND NEW PROMISE—FORM OF PROMISE—PRESENTATION OF CLAIM AND ALLOWANCE BY EXECUTRIX.

The presentation to an executrix by a creditor of the decedent of a claim against his estate and its allowance by the executrix is a liquidation of the claim and fixes a new date for the running of the Statute of Limitations. Such presentation and allowance, in the absence of fraud or collusion, establishes the validity of the claim as effectually as a judgment against the executrix.

The claim of the executrix against the estate of the testator founded on her having made a promissory note for his accommodation which she afterward paid, being dependent upon the testimony of her son, the testator's stepson, who testified to admissions by the testator which were not clear and precise and did not certainly identify the note in question, should not be allowed upon the settlement of her accounts.

Proceedings on the judicial settlement of the account of an executrix.

Roland S. Palmer, for Jeannette Nelson, executrix; Osborn, Bloodgood & Wilbur, for Catskill Foundry and Machine Works, and others, creditors; Jennings & Austin, for Deane & Deane, and others, creditors; Robert Wilkinson, for Helen D. Nelson, and another, creditors.

TALLMADGE, S.—William B. Nelson died September 3, 1906, leaving a last will and testament in and by which his widow, Jeannette Nelson, was nominated as sole executrix. On September 26, 1906, the will was admitted to probate by the surrogate of Greene county, and letters testamentary were issued to Jeannette Nelson. The executrix duly advertised for the presentation of claims; and claims were presented, as appears by the account of the executrix, aggregating \$10,664.98. The testator left an estate not exceeding in value the sum of \$2,200. On July 15, 1908, the executrix filed her account; and on the 12th day of December, 1908, she filed her petition praying for a judicial settlement of her account. All parties interested in the proceeding, including creditors, were cited to appear or duly waived the issuing and service of a citation upon them. The citation was returnable January 11, 1908. The proceeding was adjourned from time to time until March 8, 1909, at which time the creditors represented by Osborn, Bloodgood & Wilbur filed objections to the account of the executrix, and the creditors represented by Jennings & Austin joined in said objections.

Among the objections filed were the following:

“That the said executrix has not accounted for or charged herself with any interest on the moneys of said estate; and these contestants ask that said executrix be charged with interest from July 1, 1907, on all moneys of the estate in her hands on and after that date.

"That the allowance by said executrix of the claim for \$3,106.10 in favor of Helen D. Nelson against the said estate was illegal and improper; and these contestants allege, on information and belief, that the said claim of Helen D. Nelson is not, nor is any part thereof, a valid or legal claim against the said estate; and they ask that said claim be wholly disallowed.

"That the allowance by said executrix of the claim of \$204.50 in favor of Katharine J. Palmer against the said estate was illegal and improper; and these contestants allege, on information and belief, that the said claim of Katharine J. Palmer is not, nor is any part thereof, a valid or legal claim against the said estate, and they ask that said claim be wholly disallowed."

On the hearing, the objection filed to the claim of Helen D. Nelson, which consisted of several items, was amended, and the following objection was added:

"That the note presented by Helen D. Nelson for \$2,000, and allowed, is barred by the statute of limitations."

It appears by the testimony of Roland S. Palmer, the attorney for the executrix, that the claim of Helen D. Nelson was presented to him on the 16th day of February, 1907; that thereafter he, as attorney for the executrix, notified the claimant that the claim had been allowed. The claim, which was duly verified, was offered and received in evidence. The account of the executrix was also put in evidence.

It also appears from the testimony that the verified claim of Katharine J. Palmer was received by said attorney for the executrix during the month of January, 1908, and that afterward he, as attorney for the executrix, notified the claimant of the acceptance of the claim. This claim was offered and received in evidence.

The executrix then rested. No testimony was offered by the contestants.

These claims having been presented to and allowed by the executrix became liquidated and established claims against the

estate represented by the executrix. *Wilcox v. Smith*, 26 Barb. 316; *McNulty v. Hurd*, 72 N. Y. 520; *Matter of Miles*, 170 id. 75; *Matter of Miner*, 39 Misc. Rep. 605. If the contestants had the right to question the legality or justness of the claims upon judicial settlement, the burden of proof was upon them. *Matter of Warrin*, 56 App. Div. 414.

No testimony was offered by the contestants to show fraud or collusion in the allowance of such claims, or for any other purpose. The law stated in the Warrin case has long been recognized and grows out of the principle that, when a claim has once been liquidated or established, it is not necessary for the claimant to establish such claim a second time, unless mistake, fraud or bad faith is shown in the first liquidation of the claim.

The contestants, however, contend that the first item in the claim of Helen D. Nelson was barred by the Statute of Limitations. This claim became due and payable February 25, 1901. It was presented to the executrix on the 16th of February, 1907, five years, eleven months and twenty-one days after the claim became due. Clearly, upon the face of the claim, it was not barred by the Statute of Limitations at the time it was presented. The account was filed in the office of the surrogate on July 15, 1908, seven years, five months and twenty days after the claim became due. At the time the petition was filed for judicial settlement, more than seven years and six months had elapsed from the time said claim became due. And it is contended that, inasmuch as it does not clearly appear when such claim was allowed by the executrix, the burden is upon the executrix to show that said claim was allowed before it was barred by the Statute of Limitations.

It was the duty of the executrix to carefully examine every claim presented and not to allow a claim that was barred by the Statute of Limitations; and, inasmuch as the claim presented to the executrix was not disputed or rejected by her, I think it is fair to assume that the claim was not barred at the time of its

acceptance, and that the burden is upon the contestants to show to the contrary. See *Matter of Warrin*, *supra*; *Wilcox v. Smith*, 26 Barb. 316.

I am also of the opinion that the rule laid down in *Matter of Prince*, 56 Misc. Rep. 222, should be followed, that the claim, not having been disputed or rejected, and having been accepted, must be deemed to have been allowed as of the time of the presentation or filing of the same.

The contestants further contend that a verbal acceptance by the executrix was not sufficient to stop the running of the statute, and cite *Cotter v. Quinlan*, 2 Dem. 30, in support of their position. I cannot agree with the reasoning of the surrogate in that case. The opinion seems to be in direct conflict with all of the later decisions. The executor does not maintain the relation of debtor. It is his duty to collect the assets of the estate, ascertain the creditors, legatees and next of kin, and apply the assets in satisfaction of the claims in the order prescribed by law.

In *Buckhout v. Hunt*, 16 How. Pr. 409, Brown, J., says: "The claims are to be presented, not for immediate, but for ultimate payment, if the assets prove sufficient, and if insufficient, for a ratable proportion of whatever there may be."

There is no necessity for a promise in writing or a payment to prevent the running of the statute against a note after an action has been commenced or a judgment obtained; a new date is fixed thereafter from which to compute the running of the statute, and a claim once allowed by an executor becomes liquidated or established, in the method prescribed by statute, and is as effective to prevent the running of the statute against the original claim as a judgment.

In *Schutz v. Morette*, 146 N. Y. 137, 144, Andrews, J., writing the opinion, says: "The statutory system for the presentation and adjustment of claims against the estate of a decedent furnishes a summary and inexpensive method by which claims

can be adjusted without action, or by reference. The executor or administrator may, on being satisfied of the justice of a claim presented, admit it, or if he doubts its justness, may reject it and leave the creditor to his remedy by action, if a reference is not agreed upon."

In *Matter of Prince*, 56 Misc. Rep. 222, it is held: "Executors and administrators are but trustees to settle the estate under their direction or control, agreeably to the principles of the statute. Nothing is gained by obtaining a judgment against them, beyond the liquidation of the debt. When a claim has been allowed it is established."

In *McNulty v. Hurd*, 72 N. Y. 520, the court say: "It would be a contradiction in terms to say that an established claim can or should be litigated in an action or upon a proceeding for an accounting."

In *Matter of Prince*, 56 Misc. Rep. 228, the surrogate says: "There is evidence in the case, given by several creditors, that they were told by deceased executor Barnard that their claims were all right and would be paid when the real estate was sold. * * * An executor or administrator may not with impunity admit and allow a claim, for the purpose of lulling a creditor into a sense of security, until his strict legal remedy is barred by the Statute of Limitations, and then, by filing an answer in such a proceeding as this, send the creditor out of court without remedy or redress * * * to another forum, only to be met with a plea of the Statute of Limitations."

Creditors have several remedies for the adjustment of their claims against the estate of a deceased person. One, by action for the recovery of judgment; one, by a reference under the statute; one, by having the matter heard before the surrogate by stipulation, and one, by the presentation of their claims to the legal representative and the allowance of the same by the latter. The recovery of a judgment against the legal representative would not entitle the debt to preference in payment over

others of the same class. It would have the effect, however, of constituting it a liquidated debt against the estate. As already stated, the effect of such a judgment is merely to give the debt the character of a liquidated demand against the estate; and, in this respect, claims allowed by the legal representative attain the same character. And I am of the opinion that it was not the intention of the Legislature to give creditors who have liquidated their claims by judgment any advantage in the collection and enforcement thereof over other creditors of the same class, whose claims have been liquidated through the process of allowance by the legal representative. *Matter of Miner*, 39 Misc. Rep. 605.

I am, therefore, of the opinion that the objections to the claim of Helen D. Nelson and to the claim of Katharine J. Palmer should be overruled, and that such claims should stand as allowed by the executrix, except that the first item of the claim of Helen D. Nelson should be allowed at \$2,000, with interest thereon from February 25, 1901. The note upon which this claim is based is dated October 22, 1900, and payable on February 25, 1901. No agreement is contained in the note to pay interest. This note, therefore, would only bear interest from the time it became due.

After reviewing the testimony, I am of the opinion that the executrix was reasonably diligent in settling the estate and that there is no good reason why she should be charged with interest on the small balance remaining in her hands.

The only other question arising on the accounting for my consideration is whether the individual claim of Jeannette Nelson, concerning which proof was given, should be allowed. The claim is based upon a promissory note, dated July 3, 1898, in and by which the claimant promises to pay, to the order of William B. Nelson, the sum of \$552.03, at the First National Bank of Amenias, six months after date. This note was transferred by indorsement by William B. Nelson to the firm of

Willson & Eaton; and, on or about November 16, 1903, an action was commenced by Willson & Eaton against Mrs. Nelson, the maker of the note; and, subsequently, Mrs. Nelson paid to the plaintiffs the sum of \$772.31.

The presumption arises upon the face of the transaction that the claim was one in favor of William B. Nelson against the claimant; and the only evidence offered to do away with this presumption is that given by the son of the claimant, the attorney in this proceeding, as to admissions made by William B. Nelson in February, 1906, to the effect that a certain promissory note for \$552, dated July 3, 1898, made by Jeannette Nelson to him, was delivered to him by Mrs. Nelson as an accommodation note; that she did not owe him that money; that as she had been forced to pay he was obligated to pay her that amount and, as soon as he could realize some funds from the estate of his father, he would reimburse her. On the cross-examination, the witness testified that he did not remember whether the date of the note or exact amount of the note was mentioned, but that they referred to the Willson & Eaton note. This question was then asked: "And that is as far as you did refer to the note, by calling it the Willson-Eaton note?" "A. I don't remember exactly as to that." Without detailing all the testimony on the cross-examination, I will refer particularly to the following testimony: The witness was asked to state on cross-examination just what conversation took place and what language was used in reference to this note upon which the executrix's claim was based, and the witness replied: "I spoke to Mr. Nelson about a number—three or four notes, which he was obligated upon and some of which my mother was obligated upon and suggested to him that he clean those matters up as soon as he could from funds received from his father's estate, and we enumerated them in a rough way. We referred to the Barhyte matter—a note which my mother also paid but which is outlawed now, and two or three others and also this Willson-

Eaton amount and that is as near as I can recall in a rough way." On further cross-examination, the witness stated that he couldn't positively swear that any mention was made of the exact amount due his mother on the Willson-Eaton note; that he couldn't positively swear of his own knowledge that the note referred to in the summons and complaint was the only note of the same character given by his mother to William B. Nelson as an accommodation note or that the note covered by the summons and complaint was the only note upon which George T. Willson and Lewis F. Eaton had a claim against Jeannette Nelson and William B. Nelson, or either of them. He further says that he cannot swear positively whether in the conversation reference was made to the Willson-Eaton note, or the Willson-Eaton claim, or the suit. It further appears that a conversation was had between this witness and Mr. Bloodgood, in the presence of Mr. Austin, in which it is claimed that the witness Palmer stated to them, at the time of the first hearing in this proceeding, that he had no personal knowledge concerning the note in question, and that what he knew about it was hearsay.

From the testimony above referred to and all of the testimony given by the witness Palmer, it is impossible to determine what admission, if any, was made by William B. Nelson in reference to any existing indebtedness due from himself to the claimant in this proceeding. There is nothing in the testimony to show that the witness had any personal knowledge of the transaction between the claimant and her husband at the time of the giving of the note in question. There is no testimony to show that the witness was requested by his mother to speak to Mr. Nelson in reference to this claim, or that the claimant had ever demanded pay of Nelson, or claimed in any manner that Nelson was indebted to her by reason of the transaction referred to. Whether at the time this note was given she intended that her husband should have the use and benefit of it, and that he

should repay the same to her, does not appear from the testimony. If such indebtedness ever existed from William B. Nelson to his wife, the claimant, it may have been paid before the death of William B. Nelson. The testimony given by the son of the claimant is not sufficient, in my opinion, to show clearly an indebtedness existing in favor of the claimant against William B. Nelson.

This isn't a case where the court has a right to infer any fact in favor of the claimant. Such fact in order to establish the claim must be clearly proven by satisfactory testimony, otherwise the claimant is not entitled to recover. *Van Slooten v. Wheeler*, 140 N. Y. 624; *Matter of Marcellus*, 165 id. 70.

It is stated in *Law v. Merrills*, 6 Wend. 277: "Evidence to establish a fact by the confessions of the party should always be scrutinized and received with caution, as it is the most dangerous evidence that can be admitted in a court of justice and the most liable to abuse. Although a witness is perfectly honest, it is impossible, in most cases, for him to give the exact words in which an admission was made. And sometimes even the transposition of the words of a party may give a meaning entirely different from that which was intended to be conveyed to the witness."

Admissions by a defendant, when they are the only positive evidence against him, are to be carefully scrutinized. *Michigan Carbon Works v. Schad*, 38 Hun, 71.

In *Walbaum v. Heaney*, 104 App. Div. 412, it is held: "It is the policy of the law to require that claims made against the estates of deceased persons be established by very satisfactory testimony. The rule that a fact, testified to by a disinterested witness who is not discredited and whose testimony does not conflict with other evidence offered upon the trial, is to be taken as legally established, has no application to claims which are sought to be recovered against the estates of deceased persons.

* * * Where claims are sought to be established against

the estates of deceased persons, the courts are required to scrutinize the testimony with care, the attitude of the witness and any interest which may have a tendency to influence his testimony." *Scheu v. Blum*, 119 App. Div. 825; *Forbes v. Chichester*, 30 N. Y. St. Repr. 370; *Rowland v. Howard*, 75 Hun, 1; *Farian v. Wiegel*, 31 Abb. N. C. 159.

As appears by the note upon which the claim is based, it was given July 3, 1898; and, if an indebtedness existed by reason of the giving of this note from William B. Nelson to the claimant or by reason of the fact that Mrs. Nelson paid the same when an action was commenced against her, it would seem that, at the time this action was commenced, she would have done something toward requiring a settlement of that amount by her husband.

Claims thus withheld during the lifetime of the alleged debtor and presented after the party alleged to be liable is no longer capable of disputing the claim require the clearest kind of testimony in order to establish them. *Matter of Salisbury*, 41 Misc. Rep. 274; *Kearney v. McKeon*, 85 N. Y. 136.

The unsupported testimony of claimant's son as to the material facts is not such clear and satisfactory proof as to overcome the presumptions arising in this case. *Matter of Jones*, 28 Misc. Rep. 338.

In *Forbes v. Chichester*, 30 N. Y. St. Repr. 370, Pratt, J., says: "We reach this conclusion with regret, for as has been well said, the character and standing of the plaintiff are such as to relieve him from any suspicion of presenting an unfounded claim. But public policy requires that demands against deceased parties must be strictly proved, and to relax that rule would give rise to evils far outweighing the inconveniences resulting from its strict enforcement; inconveniences which could be obviated by the exercise of ordinary care in procuring written or other evidence of contracts not dependent for validity upon the continuance of the life of either party."

"It seems to be well settled that claims against the estates of deceased persons, in order to be upheld, must be clearly proved by competent evidence, and be free from any just or well-grounded suspicion of their validity." *Winne v. Hills*, 91 Hun, 89.

In view of all the testimony given in reference to this claim and the law applicable to the claims presented by legal representatives of an estate, the testimony given by the son of the claimant is not such clear and satisfactory testimony as would warrant me in finding that it is a proper or just claim against the estate of the decedent.

I am, therefore, of the opinion that it should be disallowed. Findings and decree may be prepared accordingly. Costs to the attorneys to be adjusted at the time of settling the decree.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of WALTER M. BRISTOW, Administrator with the Will Annexed of HENRY BRISTOW, Former Public Administrator of the County of Kings, as Administrator of the Goods, Chattels and Credits Which Were of GIUSEPPE TEPEDINO, Deceased.

(*Surrogate's Court, Kings County, June, 1909.*)

APPEARANCE—AUTHORITY OF RIGHT TO APPEAR—RIGHT OF CONSULS UNDER TREATIES WITH FOREIGN GOVERNMENTS.

CONSULS—APPEARANCE IN LITIGATION AFFECTING FOREIGN INTERESTS—ITALIAN CONSULS.

The Italian consul has the right to represent alien minor next of kin of a deceased Italian subject upon the judicial settlement of the accounts of the administrator of the deceased; and the appointment of a special guardian for such minors after the consul has appeared in the proceeding is improvident and should be vacated.

Proceeding upon the judicial settlement of the accounts of an administrator.

George Eckstein, for administrator; Gino C. Speranza, for Italian consul; Edward J. Fanning, special guardian.

KETCHAM, S.—The right of the Italian consul to represent alien minor next of kin of a deceased Italian subject upon an accounting by the administrator of the estate of such deceased must be recognized.

In this case appearance for next of kin of the class described was duly made by an attorney delegated by the Italian consul.

The appointment, thereafter made, of a special guardian for the Italian infants was improvident and must be set aside.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of THEODORE E. GREEN, as Executor of ANNA C. M. DREWES MEYER, Deceased.

(Surrogate's Court, Kings County, June, 1909.)

EXECUTORS AND ADMINISTRATORS: ADMINISTRATION IN GENERAL—JURISDICTION AND CONFLICT OF LAWS—FACTS CONFERRING JURISDICTION—WHAT ARE ASSETS—PROCEEDS OF SALE BY EXECUTRIX UNDER VOID POWER: ADMINISTRATIVE AUTHORITY AND MANAGEMENT OF ESTATE—MANAGEMENT AND DISPOSITION OF ESTATE—OF REALTY AND INTERESTS PERTAINING THERETO—TESTAMENTARY POWERS—UNNECESSARY POWER.

A direction to an executor in a will to sell the real estate of the testatrix to be placed in and become part of her residuary estate, where the will makes no disposition of the residuary estate, is ineffectual as a power of sale; and a sale by the executor thereunder is void and does not divest the heirs at law of their title.

The proceeds of such a sale in the hands of the executor are not assets, and he cannot be called upon to account therefor in the Surrogate's Court.

Proceeding upon the judicial settlement of the accounts of an executor.

Caldwell, Logan & Holmes, for executor; Richard M. Bruno, for Doris Hefter, heir at law and next of kin; Hugo C. Gollmar, for J. Louis Meyer, husband.

KETCHAM, S.—The will, after numerous legacies of money, contains the following:

“I do hereby direct, authorize and empower my executor hereinafter named and appointed, to sell and convey, for such price as he shall deem proper, all that certain lot of land with the building and improvements thereon, situate, lying and being in the borough of Brooklyn, in the city of New York, and known and designated as and by the number Three hundred and fifty-one (351) Pulaski street, the premises wherein I now reside, and the proceeds of such sale I direct to be placed in and become part of my residuary estate.”

There is no residuary disposition in the will. The decedent left no descendants, but her husband survives her.

The executor has sold the real estate mentioned in the will, and in his final account includes the proceeds of such sale, together with the rents collected by him between the death of the testatrix and the time of sale.

The attempted power of sale was void, and the sale was ineffectual to divest the heirs of the fee which vested in them at the death of the decedent. *Sweeney v. Warren*, 127 N. Y. 426.

The proceeds of sale have not come into the hands of the executor as a part of the fund under administration. He holds them simply as one who, without warrant, has sold the property of another and is ready to account for its price.

An executor can account for proceeds of the sale of lands not devised to him in trust only when he has sold them pursuant to a power of sale contained in the will; and it is not conceivable that the results of a sale for which there is no valid warrant in the will became any part of the fund intrusted to him as executor.

The proceeds of a sale which the executor as such had no right to make, and which he has made only in his individual capa-

city, cannot be the subject of accounting in this court. The executor, in collecting the rents, acted without his office, and holds the avails only as an individual.

No question is made of the practical fidelity of the executor; but, so far as he has been faithful to an idle and empty provision in the will, he has intruded upon the rights of the heirs and cannot account to them in this proceeding as to either the proceeds of the land or its rents.

The residue of the personalty is claimed by the next of kin, but it belongs to the husband. Where a wife leaves a husband and no descendants, there is nothing in the Statute of Distributions to disturb the common law under which the husband takes absolutely all unbequeathed assets.

The account should be stated to conform to these views.

Decreed accordingly.

Matter of the Judicial Settlement of the Accounts of JULIUS SCHARMANN and JUSTUS BLEIDNER, as Sole Qualified Trustees Under the Last Will and Testament of FREDERICK WESTPHAL, Deceased.

(Surrogate's Court, Kings County, June, 1909.)

INSANE PERSONS—PROPERTY AND LIABILITIES OF INCOMPETENTS—RIGHT AND TITLE OF COMMITTEE.

TRUSTS—THE BENEFICIARY, HIS RIGHTS AND INTEREST—RIGHTS OF BENEFICIARY TO INCOME WHERE BENEFICIARY IS INCOMPETENT.

Under a trust to apply the income, revenue and profit of the testator's estate to the maintenance and use of his two sons during their natural lives, the beneficiaries are entitled to the entire income; and, where they are incompetent, it should be paid to their committee.

Proceeding upon the judicial settlement of the accounts of trustees.

Frank Obernier, for trustees; John M. Zurn, for committee of the incompetents; Leroy W. Ross, special guardian for Rosie

Westphal, infant; Charles Hentschel, Jr., for Justus Bleidner, trustee; George M. S. Schulz, for Catherine Orthey, Elizabeth Stegman, Frederick Westphal, Ella Andrews and Mary Wells.

KETCHAM, S.—Construction is required of the following paragraph of the will under which trustees are accounting:

“Second. I give, devise and bequeath all the rest, residue and remainder of my real and personal estate to my friends, Julius Scharmann, Pastor Gustav Sommer and Justus Bleidner, the survivors or survivor of them, or such one or more as may accept the trust, in trust to enter upon and take possession of my real and personal estate, and apply the income, revenue and profit to the maintenance and use of my two sons, Wilhelm and George, during their natural lives, or the life of the survivor of them, excepting that my six lots on Newton Heights, Queens Co., shall pass to and be the absolute property in fee of my other five children.

“I hereby appoint my said friends, Julius Scharmann, Gustav Sommer and Justus Bleidner to be Executors of this, my last Will and Testament, with full power to my said Trustees to sell and convey my real estate.”

The will does not contain any remainder over or other alternative disposition with respect to the income. The two beneficiaries have been incompetent from birth, and there is in the hands of the trustees a balance of accumulated income over and above that which has been in the past necessary for their support.

The trust is not to apply the income of each year to the support of the beneficiaries during that year. Its provision is that the income shall be devoted to the maintenance and use of the incompetents during their natural lives. It is thus intended that income accrued in the past and not expended shall be held for disbursement in the future, upon any emergency which may arise to involve an expenditure greater than that which has heretofore been found sufficient in each year.

To take out of the trust the unapplied income would, in case of increased need in the future, put upon the testator's benefaction a limit which he did not set and would violate his purpose. Hence, if there were a provision which limited one of these beneficiaries only to so much of the income as was needed for his support, the excess not required to fulfill the purpose of the trust could only be ascertained at the end of his life, and the fund would remain in the trust in the meantime. Any right which might supervene upon the interest of the beneficiary would be abated, in enjoyment at least, until it became known that the beneficiary no longer needed the provision for his maintenance; but no right in remainder or other alternative gift of the income appears, and the trust to apply the income to the maintenance and use of the beneficiaries vests the entire income in them.

"Use" is the ancient definition for every form of beneficial or equitable ownership. There is no more all-embracing term for any estate which is less than legal. The history of the word must be forgotten before it can be reduced by the special guardian's argument to bear, in respect to the language of the trust its colloquial meaning. Whatever its limitations, it cannot be made to betoken in a will such employment or enjoyment as the needs of the user may require. Nor is it reasonable to restrict its meaning in this will by its association with the word "maintenance." The provision for these incompetents can only be satisfied by the payment to them of the entire income. Were they competent, no one would doubt that the trust to apply the income to their "maintenance and use" would vest in them the equitable right to the whole income. The construction of the will is not to be affected by the casual circumstance of their incompetency. That which would have been theirs if they had been capable of managing their affairs remains theirs and should be paid to their committee.

Decreed accordingly.

Matter of the Estate of WILLIAM P. PETERSON, Deceased.

(Surrogate's Court, Cattaraugus County, July, 1909.)

BANKRUPTCY—DISCHARGE OF BANKRUPT: EFFECT: CANCELING JUDGMENT AGAINST BANKRUPT—NECESSITY.

SURROGATE'S COURTS—NATURE AND EXTENT OF JURISDICTION—ADMINISTRATION OF DECEDENTS' ESTATES—SETTLEMENT OF CLAIMS ON ACCOUNTING BY REPRESENTATIVES—CLAIMS BY AND AGAINST ESTATE IN GENERAL—EFFECT OF DISCHARGE IN BANKRUPTCY.

Where, prior to the death of an intestate, he had been granted a discharge in bankruptcy, the fact that neither he nor his administrator had complied with the provisions of section 1268 of the Code of Civil Procedure, whereby a public record might be made of the fact that a judgment which was a provable debt in the bankruptcy proceedings had been released by the decedent's discharge, does not entitle the judgment creditor to participate in the distribution of the estate.

Where, upon the judicial settlement of the accounts of the administrator, said judgment creditors filed proof of their respective claims and asked that said judgments be paid from the estate, the burden is upon them to show that their claims were not released by the decedent's discharge in bankruptcy.

The Surrogate's Court had jurisdiction and it was its duty to give effect to the discharge in bankruptcy.

See 68 Misc. 11.

Proceedings on judicial settlement of administrator's accounts.

Creighton S. Andrews, for administrator; Henry Donnelly and Fred L. Eaton, for judgment creditors.

DAVIE, S.—Decedent died, intestate, March 19, 1908, at the city of Olean, N. Y., and letters of administration upon his estate were issued May 14, 1908, to George G. Peterson, a brother, who now files his petition and account as such administrator for judicial settlement.

No controversy exists upon this accounting, except as to the right of certain judgment creditors of decedent to participate in the distribution of the funds of the estate.

Prior to the death of decedent, various judgments were procured and duly docketed against him, sufficient in amount in the aggregate to substantially absorb the entire residue of the funds left for distribution. None of these judgments has been paid; and such judgment creditors appear in this proceeding, file proof of their respective claims and ask that the same be allowed and paid from the balance left for distribution. To each of these claims the administrator files an answer in writing duly verified, denying the validity and legality of the claims and alleging, in substance, that, after the docketing of these judgments, decedent filed a voluntary petition in bankruptcy and that such proceedings were had upon said petition that, on the 18th day of December, 1900, a decree was duly made by the District Court of the United States, discharging the decedent from all debts and claims existing against him on the 16th day of October, 1900 (on which day the petition for adjudication was filed), except such debts, if any, as were by law exempt from the operations of a discharge in bankruptcy. It was stipulated that each of the demands upon which the various judgments were obtained was properly provable in bankruptcy proceedings. It was also conceded that neither the decedent nor his personal representative had complied with the provisions of section 1268 of the Code of Civil Procedure (Debtor and Creditor Law, § 150 [Consolidated Laws, ch. 12]); and it is contended on the part of the judgment creditors that, notwithstanding the discharge in bankruptcy, they are entitled to share in the distribution, in consequence of the failure of the decedent or some one on his behalf to resort to the procedure prescribed by the section referred to.

This necessitates an examination of the import and legal effect of that provision. The section provides: "At any time

after one year has elapsed, since a bankrupt was discharged from his debts, pursuant to the acts of Congress relating to bankruptcy, he may apply, upon proof of his discharge, to the court in which a judgment was rendered against him, * * * for an order, directing the judgment to be canceled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment, or the debt upon which such judgment was recovered, an order must be made directing said judgment to be canceled and discharged of record; and thereupon the clerk of said court shall cancel and discharge the same by marking on the docket thereof that the same is canceled and discharged by order of the court, giving the date of the entry of the order of discharge."

The portions of the section not above quoted relate to the preservation of liens upon real estate and to the method of procedure under such section and are of no consequence in this controversy.

If the position of the judgment creditors be correct, then the decree of the United States District Court was entirely inoperative, so far as these judgments were concerned, until supplemented by an order of a court of this State, made pursuant to the provisions of the section quoted. Such contention cannot be maintained, having in mind the general and exclusive jurisdiction of the United States courts in bankruptcy proceedings. In this case the final decree in bankruptcy provides:

"Whereas, William P. Peterson of Olean in the county of Cattaraugus and State of New York has been duly adjudged under the Act of Congress entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1st, 1898, and appears to have conformed to all the requirements of the law in that behalf,

"It is therefore ordered by the court that William P. Peterson be forever discharged from all debts and claims which by said act are made provable against his estate and which existed

on the 16th day of October, 1900, on which day the petition for adjudication was filed, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy."

The United States courts having exclusive jurisdiction of such proceeding and having made a definite and final decree therein, it would be unreasonable to contend that such decree was ineffective and inoperative until supplemented by the decree of the State court, or that the Legislature of the State of New York had any authority to limit, modify or extend the provisions of the judgment of the United States court. When the decree of the United States court provided that the decedent was discharged from all debts and demands existing against him on the 16th day of October, 1900, and which were properly provable in bankruptcy, it did not mean that he should be so discharged if the Legislature of the State of New York concurred and adopted the necessary legislation to carry such decree into effect. The section of the Code quoted, however, is not meaningless, nor adopted without practical necessity. While the judgments referred to were actually discharged by the decree in bankruptcy, yet they still remained, apparently in full force and effect, upon the records; this section, accordingly, provides a method whereby the public records might be made to conform to and set forth the actual facts, that is, whereby a public record might be made of the fact that such judgment had been discharged by proceedings in bankruptcy. This conclusion is sustained by *Graber v. Gault*, 103 App. Div. 511; *Pickert v. Eaton*, 81 id. 423.

In the case last cited, Spring, J., considering the section referred to, says: "Section 1268 of the Code of Civil Procedure was adopted for the purpose of enabling a judgment debtor, who has been adjudged a bankrupt, to secure the cancellation on the docket of any judgment appearing on record against him. The effect of the entry of the order was not to discharge the judg-

ment, for that had already been accomplished by the final order in the bankruptcy proceedings."

The next and remaining question calling for consideration in this connection relates to the order or burden of proof in establishing the fact of the discharge of the judgments in question by the proceedings in bankruptcy. The administrator makes his case by proving the final decree in bankruptcy, together with the stipulation to the effect that these judgments and the causes of action upon which they were obtained were properly provable in bankruptcy without attempting to show affirmatively that these judgment creditors were actually made parties to the bankruptcy proceedings, upon the theory that the terms of the final decree in bankruptcy were general, reciting the regularity of the proceedings and asserting that all debts and demands against the decedent were thereby discharged, except such as were not properly provable in bankruptcy, and that, if any reason existed exempting these particular demands from the general operation of the decree, the burden was upon the judgment creditors to affirmatively establish such reason.

While the terms of the decree in bankruptcy are general, assuming to discharge all provable claims and demands against the decedent, yet such decree must be read and construed with reference to the provisions of the Bankruptcy Act under which it is made. Section 15 of the National Bankruptcy Act, approved July 1, 1898, provides: "A discharge in bankruptcy shall release a bankrupt from all his provable debts, except (1) such as are due as a tax levied by the United States, the State, county, district or municipality in which he resides; (2) are judgments in actions for fraud, or obtaining property by false pretense or false representations, or for wilful or malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt unless such creditor had notice or actual knowledge of the proceedings in bank-

ruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation, while acting as an officer or in any fiduciary capacity."

The question, then, is, was the burden of proof upon the administrators of showing affirmatively that the judgments in question did not come within the operation of either of the four exceptions, or did the duty of so doing rest upon the judgment creditors. It has been enunciated as a fundamental proposition that: "When a cause of action or matter of defense under a statute is pleaded, which statute contains a proviso or exception in the same substantive clause on which the cause of action or defense is founded, although the declaration or plea must deny that the cause of action or defense is within the exception or proviso yet it is not necessary for the party to prove the negative, but it rests with the other party to prove the affirmative."

This rule was recognized and applied in the well-considered case, *Sherwood v. Mitchell*, 4 Den. 435, where the court, in considering the effect of a discharge in bankruptcy, says: "The discharge is presumptive evidence of all the facts asserted in it and is conclusive until overthrown by evidence of some fact which by the act avoids it; this discharge if true, is general in its terms and *prima facie* is a discharge of the bankrupt from all his debts; but the *creditor* may, notwithstanding, show that his debt is of the excepted class; the *onus*, however, is upon him and if he fails to make proof, the debt will be taken to be one of an ordinary character."

This decision was made under the former Bankruptcy Act and not under the Act of 1898, yet there is no sufficient distinction in the phraseology of the two acts as to effect the question under consideration.

This principle was also recognized in *Bump, Bankruptcy* (11th ed.), 725; *Collier, Bankruptcy* (3d ed.), 202; *Sedgwick Stat. Const.* 50; *McCabe v. Cooney*, 2 Sandf. Ch. 314; *Harri-*

son v. Lourie, 49 How. Pr. 124; Stevens v. King, 16 App. Div. 377; Chapman v. Forsyth, 2 How. (U. S.) 202.

If these decisions and authorities are to be followed, the conclusion is irresistible that the *onus* was upon the judgment creditors of showing affirmatively, by way of defense, that, for some reason, their claims were excepted from the general provisions of the decree of discharge in bankruptcy. There does not seem to be anything in the prevailing opinion in *Columbia Bank v. Birkett*, 174 N. Y. 112, inconsistent with this conclusion. It will be accordingly held in this proceeding that the administrator had made a sufficient *prima facie* case, upon establishing the decree in bankruptcy in connection with the admission that the judgments and claims upon which they were based were properly provable in bankruptcy.

It is also contended on the part of the judgment creditors that the Surrogate's Court has no jurisdiction upon this accounting to in any manner inquire into the status of these judgments; that nothing remains to be done but to direct the payment of the claims out of the balance left for distribution. While it is true that the Surrogate's Court is one of limited jurisdiction, having no right to determine the validity of controverted claims against an estate except by consent of parties executed and filed pursuant to the statute, yet the issue here involved is not one of the original validity of the demands upon which such judgments were obtained. No effort is made to attack the regularity of either of them; the proceedings of the courts in which they were obtained are not under review, nor is any question raised or sought to be injected regarding the jurisdiction of the United States court to make just such a decree as has been made; all we are asked upon this accounting to do is to apply the final adjudication of one court, concededly having jurisdiction, to the judgment of another court. To illustrate—assume that, after the rendition of each of these judgments, actions had been brought upon them, respectively, in equity, to set them aside

and such actions had been prosecuted to final judgment determining the invalidity of such judgments; would or could it be contended that the Surrogate's Court, upon final distribution of the funds of the estate, had no right or jurisdiction to observe the determination of such court of equity and apply the same in making distribution? The situation is simply this: Valid judgments were originally obtained against decedent; subsequently a court of competent jurisdiction has, by its judgment, declared these judgments discharged. The Surrogate's Court would certainly be one of very *limited jurisdiction* if it had no right to observe and apply the facts as they actually exist in this particular.

A decree will be entered in this proceeding directing that the funds of this estate remaining for distribution be paid by the administrator to the next of kin of said decedent in accordance with the statute excluding the judgment creditors from participation in such distribution.

Decreed accordingly.

Matter of the Estate of ADELBERT E. DARROW, Deceased.

(*Surrogate's Court, Cattaraugus County, July, 1909.*)

EVIDENCE—PRESUMPTIONS: VALIDITY OF INSTRUMENTS—INSTRUMENTS SHOWING ALTERATIONS: ABSENCE OF WITNESSES OR DOCUMENTARY EVIDENCE—WITNESSES EQUALLY AVAILABLE TO EITHER PARTY.

EXECUTORS AND ADMINISTRATORS: DEBTS AND LIABILITIES OF THE ESTATE—IN GENERAL—RECOMPENSING SURETY FOR DECEDENT: ACCOUNT AND SETTLEMENT—CONTEST, OBJECTIONS AND HEARING AND SETTLEMENT THEREOF—PRESUMPTIONS AND INFERENCES—FROM ACTS OF DECEDENT IN HYPOTHECATING ANOTHER'S STOCK.

PRINCIPAL AND SURETY—RIGHTS AND REMEDIES OF SURETY AGAINST PRINCIPAL—RECOVERY OVER.

Where, after the death of a testator in 1908, a certificate of corporate stock, given to his wife in 1906 as a wedding present, was found to be in the possession of a bank claiming to hold it as collateral security for the payment of an indebtedness of decedent to it,

and it appears that the assignment of the certificate had been changed by the cashier of the bank erasing the wife's name as assignee and the original date and writing in pencil, in place thereof, a new date and the name of the bank which thereafter disposed of the stock under an alleged lien thereon and applied the avails thereof on the said indebtedness; and, the cashier not having been called as a witness, there is no evidence tending to show by whose authority or direction the erasures and interlineations in the assignment were made, or the circumstances under which the bank obtained possession thereof; and where it further appears that, shortly before his death, testator, in a conversation with one K., expressly recognized his wife's title to said stock, the reasonable inference arising from the presumption of the continuance of the wife's title, though to some extent overcome, is that she consented to the use of said stock as collateral security for decedent's indebtedness at the bank; and upon the judicial settlement of the executor's accounts she is entitled to be recompensed from the funds of the estate which had been benefited by the enforcement of the lien of the bank.

No unfavorable presumption could be indulged in favor of one party as against the other because of failure to call the cashier as a witness, he being equally available to both parties.

The principle that upon one seeking to maintain title under an instrument in writing showing on its face material alterations lies the burden of satisfactorily accounting therefor was inapplicable for the reason that a mere delivery of the certificate as collateral was effectual and no written assignment was necessary.

Proceedings on judicial settlement of executors' accounts.

Charles E. Congdon, for executors; G. W. Cole, for Trudie Darrow Wilson, and as special guardian; W. S. Thrasher, for Dell G. Darrow, creditor.

DAVIE, S.—The only controversy upon this accounting relates to the claim of Mrs. Darrow. Decedent died February 15, 1908, leaving a will bearing date August 1, 1907, which was admitted to probate February 24, 1908. By the provisions of such will decedent gave to his widow, absolutely, his dwelling-house in the village of Little Valley and all his household furniture. He bequeathed to his executors \$2,000, par value, of the

capital stock of the Cattaraugus Cutlery Company, in trust, directing his executors to retain title thereto and the charge and control thereof until, in the exercise of their good judgment, it should seem for the best interests of the beneficiary to sell the same; when sold to invest the proceeds thereof upon unincumbered real estate; to apply the earnings of such stock until sold and the interest derived from the investment of the proceeds after the sale thereof, or such portion thereof as might be necessary, to the support and education of Donald D. Wilson, infant grandson of decedent; and, when he became twenty-one years of age, to transfer such stock, if not then sold, or the proceeds of the sale thereof, with any unexpended portions of the accumulations, to the grandson, to be owned by him thereafter absolutely. One-half of the residue of his estate, real and personal, he gave to his widow, absolutely; the use of and income from the other one-half he gave to his daughter during life, with the reversion to the grandson, providing, however, that, if the income of such one-half should be insufficient to properly support and maintain the daughter, such portion of the principal as might be necessary should be used for that purpose. Decedent was a widower at the time of his marriage with the claimant, September 12, 1906; he had only one child, the legatee, Trudie Darrow Wilson.

Decedent and the claimant were married at the residence of her parents, at Chaumont, Jefferson county, N. Y. On the day of and immediately preceding the marriage ceremony, decedent called for pen and ink and a place to write and, upon being provided with the same, took from his pocket a certificate for fourteen shares of the capital stock of the Cattaraugus Cutlery Company of the market value of \$3,500, inquired of the claimant how she intended to write her name after their marriage and, after being informed, wrote her name "Dell Govro Darrow" in the printed blank assignment on the back of the certificate, dated and signed the assignment and thereupon delivered the

certificate to the claimant, saying: "This is your wedding present. It is fourteen shares of stock." Claimant took the certificate, went to her room and placed the same in her valise. Later in the day, after the marriage, claimant stated to her father and mother, in the presence of the decedent, that he had given her fourteen shares of stock in the Cattaraugus Cutlery Company for a wedding present, to which decedent replied, "It is valued at thirty-five hundred dollars." The evidence discloses nothing further concerning the history of this certificate, its ownership or possession, until after the death of the decedent, when it is discovered in the possession of the Cattaraugus County Bank, such bank claiming to hold the same as collateral security for the payment of decedent's indebtedness at the bank. The assignment had been changed, by erasing the name of the claimant as assignee and the original date and writing in pencil, in place thereof, the name of the bank and the date, April 2, 1907. Such stock was subsequently disposed of by the bank by virtue of its alleged lien thereon and the avails thereof applied on the indebtedness of the decedent. This is substantially all the evidence offered at the trial and three distinct propositions are established thereby:

First. That claimant acquired title to the stock represented by the certificate in question from her husband by gift *inter vivos* September 12, 1906; second, later, the bank obtained possession of the certificate, claiming to hold it as collateral security for the payment of decedent's indebtedness; and third, the assignment on the back of the certificates had been altered in the particulars above specified. No evidence is offered showing by whose authority or direction the erasures and interlineations in the assignment were made, or the circumstances under which the bank obtained possession. Consequently, the question of title to this certificate at the time of decedent's death must be determined from the inference fairly deducible from the established facts and the presumptions properly applicable thereto.

The change in the assignment having been made by the bank's cashier, it is apparent that he possesses some information in regard to the manner in which the bank obtained its possession; but he is not produced as a witness by either party. No unfavorable presumption, however, can be indulged in favor of one party as against the other on account of the failure to produce this witness, he being equally available to both parties. *People v. Sweeney*, 41 Hun, 332; *Horowitz v. Hamburg Am. Packet Co.*, 18 Misc. Rep. 24; *Shannon v. Castner*, 21 Penn. Super. Ct. 294.

The claimant relies upon the principle that one seeking to maintain title through the instrumentality of a written instrument, presenting upon its face evidences of material alterations, assumes the burden of satisfactorily accounting for such alterations. *Greenl. Ev.* 564; *Herrick v. Malin*, 22 Wend. 388; *Acker v. Ledyard*, 8 Barb. 514; *Booth v. Powers*, 56 N. Y. 22.

This principle, however, is hardly applicable to this case, because no written assignment was necessary to enable the bank to accept and hold this certificate as collateral security; the mere delivery of the same for the purposes mentioned would have been entirely effectual. *Gilkinson v. Third Ave. Railroad Co.*, 47 App. Div. 472; *Walsh v. Sexton*, 55 Barb. 251; *Westerloo v. De Witt*, 36 N. Y. 340, 345; *Allerton v. Lang*, 10 Bosw. 362; *Hackney v. Vrooman*, 62 Barb. 650, 670; *Bradley v. Hunt*, 23 Am. Dec. 604.

The only title the bank asserted to the certificate was by way of lien thereon to secure the indebtedness of the decedent. It made no pretense of having acquired the absolute title or any other interest than the one stated.

But, assuming that the bank's title rested entirely upon the written assignment, if the alterations were made by Ballard, the cashier, by direction of the claimant, the transaction was entirely legitimate; if made without her knowledge or acquiescence, the act of the cashier was illegal and possessed the ele-

ments of criminality. The certificate was either delivered to the bank and the assignment altered with claimant's knowledge or both larceny and forgery were perpetrated in depriving her of it. The evidence failing to show what the fact is, resort must be had to presumption. 16 Cyc. 1082.

In *People v. Minck*, 21 N. Y. 541, Comstock, Ch. J., in considering this subject, says: "In this case it seems that the number two hundred and sixty-six had been first written upon the statement as the plaintiff's vote; that this number was erased and two hundred and seventy-three written over it; as the return appeared when introduced in evidence. We think the plaintiff was not called upon to explain the erasure or alteration. We are to assume, because the contrary is not shown or suggested, that on an inspection of the writing at the trial, the larger number was plainly written over the smaller, so as to leave no doubt as to the actual reading of the document and that the alteration appeared to be made with the same hand as the residue of the statement, with the same ink, at the same time. *The law does not presume wrong where none is proved.*"

Where a situation is explainable on the basis of legality, it will be assumed that such is the explanation. 16 Cyc. 1083; *Green v. Benham*, 57 App. Div. 9.

Consequently, the result follows in judicial determinations that he who claims the existence of illegality must prove it. 16 Cyc. 1082, and cases there cited.

It would not be a violent or unreasonable inference to suppose that the claimant, for the purpose of rendering financial assistance to her husband, permitted the deposit of this stock as collateral security for the payment of his debts at the bank. It would seem more consistent with the principles enunciated in the authorities cited to adopt that inference than the one of illegal or criminal procedure on the part of the decedent or the officers of the bank. Such a conclusion, however, does not deprive the claimant of her right to recover, for there is another

equally well-defined presumption to which reference in this connection should be made. "Proof of the existence at a particular time of a fact of a continuous nature gives rise to the inference, within logical limits, that it exists at a subsequent time." Applied to this case, the presumption is that, the claimant having acquired absolute title to the certificate in question on September 12, 1906, such title continued until other facts appear overcoming the presumption. "Such inferences of continuance, however, are merely inferences of fact and may, therefore, under the general rule, be rebutted." 16 Cyc. 1052.

This presumption of continuing title on the part of the claimant is to some extent overcome by the other proof in the case, viz., possession on the part of the bank claiming a lien thereon for payment of decedent's debts. But it will be observed that the bank has never claimed to be the absolute owner of this certificate, nor any interest in it, except the right to hold it as collateral security for the purposes mentioned. This still left the legal title in the claimant, subject to the lien of the bank. In view of this state of facts, a conclusion may be arrived at entirely in harmony with all the various presumptions to which reference has been made, without imputing criminality or misconduct to any one. The reasonable inference is that the claimant, being the owner of this stock, consented to its use as collateral security for decedent's debts at the bank; the bank ultimately finds it necessary to enforce its lien and does so, and thereby claimant is deprived of her property, and decedent's estate has the benefit of it. If such is the case claimant is entitled to be reimbursed from the funds of the estate.

It appears from the evidence of the witness Korn, that, shortly before the decedent's death, witness had a conversation with him regarding the coming January election of directors of the Cattaraugus Cutlery Company, in which Korn said to decedent: "Why, Dell, you have considerable stock;" to which decedent replied that he did not then have as much as formerly, as he had given some of the stock to his daughter, Trudie, and some

to his wife. Here was an express recognition on the part of the decedent of his wife's title to the stock, without any intimation or suggestion that she had ever transferred the same to him. In view of all these facts, the conclusion seems well founded that the claimant is entitled to recover the value of this stock in question from the estate. Upon the trial the following stipulations were made: "It is stipulated that the market value of the stock in controversy is \$3,500 and that it was at the time of the alleged conversion of the stock.

"That, on or about April 21, 1908, the Cattaraugus County Bank assumed to sell this stock in question, and that they applied the proceeds thereof to the payment of the indebtedness of the deceased, which indebtedness was held and owned by the bank."

A decree will be entered herein establishing the claim of the claimant at the sum of \$3,500, and directing the payment thereof out of the estate. The balance of the claim, to wit, that part thereof based upon the check of the decedent set forth in the claim filed, is disallowed, the same not having been satisfactorily established.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of J. HAMPDEN DOUGHERTY and LEVI S. TENNEY, as Executors of the Last Will and Testament of SALINA HUDSON, Deceased.

(*Surrogate's Court, Kings County, July, 1909.*)

WILLS—INTERPRETATION AND CONSTRUCTION—ABATEMENT—ORDER OF ABATEMENT.

Where a testator's estate is insufficient to pay in full a legacy to his stepson, an incompetent, a legacy to one of three persons who might become his committee and guardian, and a legacy to a cemetery association in trust to apply the income to the repair and preservation of the family monument and burial lot, the estate will be applied proportionately in payment of these legacies.

Proceeding upon the judicial settlement of the account of executors.

Harry David Kerr, for executors; Dykman, Oeland & Kuhn, for Brooklyn Trust Company, as committee of George A. Hudson; Greene, Hurd & Stowell (Richard T. Greene, of counsel), for Cypress Hills Cemetery.

KETCHAM, S.—The estate which is the subject of the present accounting is insufficient to pay all of the legacies. There are three legacies, in behalf of each of which a claim is made that it should be preferred and saved from abatement, upon considerations which in each instance would require the payment of the legacy in full, if it was found in contrast with ordinary gratuitous legacies of the class generally subject to abatement.

Thus, the first provision for the stepson was doubtless inspired by solicitude for one who bore to the testatrix the practical relation of foster son and who was helpless and unfortunate. A legacy for his support and protection would rank higher than a legacy or series of legacies of a general character.

The next legacy was given as an inducement or reward to one of three persons who might become the committee of the incompetent stepson and give to him the personal care and guardianship which he needed and which had been given to him by the testatrix. This in turn was a legacy to be preferred above legacies of general import, not only on the ground that it was intended for the protection of one who stood close to the affections of the testatrix, but also because it was a legacy given in compensation for a service to be performed by the legatee.

The gift to the cemetery, in trust to apply the income to the repair and preservation of the family monument and burial ground, was for a pious use and may, perhaps, be regarded as a provision for funeral or mortuary expenses. On either ground it would ordinarily not be subject to abatement along with general legacies.

When, therefore, there are three gifts, all equally appealing for preference upon grounds of equal weight and influence in each case, it would seem that they are of equal rank, each entitled to the same degree of preference and, therefore, among themselves entitled to none. The estate, not being sufficient to discharge these three legacies in full, must be applied proportionately.

Decreed accordingly.

NOTE ON ABATEMENT OF LEGACIES.

DEFINITION.

The reduction of a legacy because of the insufficiency of the testator's estate to pay all his debts and legacies in full. In *re Martin*, 25 R. I. 1.

PRESUMPTION OF EQUALITY AMONG LEGACIES.

A general legacy can only have preference over other general legacies in the same will, when it is given for the support and maintenance of a near relative otherwise unprovided for, or for the education of such relative or in lieu of dower. *Bliven v. Seymour*, 88 N. Y. 469.

It seems that the courts are more ready to charge general legacies upon lands where the legatees are of the blood of the testator so as to be presumed to be the natural objects of his bounty; the tendency is less strong where the legatees are strangers in blood. *McGoldrick v. Bodkin*, 140 App. Div. 196.

EFFECT OF DIRECTIONS IN THE INSTRUMENT.

Where chances of abatement are anticipated by testator and provided for in the will, then the testator's directions must govern. *Hotaling v. Marsh*, 132 N. Y. 29.

A proportionate abatement may be directed by the will. *Shethar v. Sherman*, 65 How. Pr. 9.

And this is so, even though the legacies would not otherwise abate equally. *Orton v. Orton*, 3 Abb. Dec. 411.

A legacy in lieu of dower abates proportionally. *Tickel v. Quinn*, 1 Dem. Surr. 425.

Preferences may be created by the will among legacies which but for the provisions thereof would abate proportionally. *Stanford M. E. Church v. Hebard*, 28 App. Div. 548.

The testator may provide that certain indicated legacies shall be paid in full and others abate. *Stanford M. E. Church v. Hebard*, 28 App. Div. 548.

The testator may provide that certain specific legacies shall bear the burden of loss for the benefit of other legacies of the same class. *Richardson v. Hall*, 124 Mass. 288.

Where a will provided that legacies should be paid in full in case testator's total estate amounted to three hundred thousand dollars, but, if less than that sum, the legacies should abate in proportion, it was held that by "total estate" only such property as was left after the payment of debts and expenses was meant. *Hackes v. Frankenheimer*, 130 App. Div. 454.

That legacies as stated in the will are preceded by the words "first," "second," etc., does not show an intent on the part of the testator that the legacies should be satisfied in full according to their order. *Matter of McKay*, 5 Misc. 123.

WHERE DEFICIENCY RESULTS FROM DEVASTAVIT.

Where the deficiency is caused by a devastavit of the executor, the legacies will abate proportionately, even though some be specific and others general. *Farmers v. McCarthy*, 56 Misc. 413.

Where a devastavit occurs after a fund has been set aside for the payment of specific legacies, residuary legatees who have received their share may not be compelled to account to the specific legatees. *Buffalo v. Leonard*, 154 N. Y. 141.

AFTER-BORN CHILDREN AS CAUSING ABATEMENT.

Legacies may abate to provide for the share of after-born children. *Ward v. Ward*, 120 Ill. 111.

Those who have received their shares must refund for such purpose. *Napier v. Howard*, 3 Ga. 192.

A provision for a child will usually prevent the operation of a statute providing for after-born children. *Osborn v. Jefferson*, 116 Ill. 130.

EFFECT OF ADDITIONAL LEGACIES IN CODICIL.

Unless there be something which shows a contrary intention on the part of the testator, legacies given by a codicil stand upon the same ground, and are subject to the same conditions, as those contained in the original will. *Matter of Frankenheimer*, 130 App. Div. 434.

An additional legacy under a codicil for a specific purpose, which would be ineffectual, unless the amount were given without abatement, is not subject to proportional abatement where the estate falls short of the specified value. *Matter of Frankenheimer*, 140 App. Div. 434.

EFFECT OF INSUFFICIENCY OF PERSONALTY ALONE.

As a general rule, sufficient to cause legacies to abate, and they are not payable out of the realty. *McGoldrick v. Bodkin*, 140 App. Div. 196.

But otherwise, where a departure from the rule was necessary to carry out the purposes of the will. *Morse v. Tilden*, 74 App. Div. 132.

WHAT LEGACIES ABATE.

The loss must fall first on the residuary legatee, and he cannot call upon either the general or specific legatees to abate in his favor even though there be no residue otherwise. *Matter of Title Guaranty Co.*, 195 N. Y. 339.

Where the chances of deficiency are anticipated, and provided for by the express terms of the will, then the directions of the testator will of course govern, and the loss must be borne by those on whom he places it, even if the burden is cast upon some of the specific legacies for the benefit of others of that class, or for the benefit of legatees whose bequests are founded on a good consideration. *Richardson v. Hall*, 124 Mass. 228.

Loss falls primarily upon the general legacies, and they must abate proportionally, unless the will exhibits an intention on the part of the testator to prefer one of the general legatees over another. *Matter of Merritt*, 86 App. Div. 179.

A provision in a will for the erection of headstones over the graves of the testator's parents has been directed by the court to be paid in full, although the assets were insufficient to pay the general legacies. *Wood v. Vandenburg*, 6 Paige, 277.

Rule as to abatement of general legacies held always applicable to legacies which are in their nature mere bounties, based upon no valuable consideration. *Lyons v. Steinhardt*, 37 Misc. 628.

The legatee's mere relationship to, or dependence upon, the testator, or the meritorious object for which the legacy is to be applied, held not sufficient to exempt it from abatement. *Matter of Bialostosky*, 27 Misc. 716.

Bequest to testator's child held subject to abatement. *Bubidge v. Vitum*, 156 Mass. 38.

Legacy to grandchild subject to abatement. *Matter of Bialostosky*, 27 Misc. 716.

Legacy to a brother or sister subject to abatement. *Matter of Hinman*, 32 Misc. 536.

Bequests for charitable purposes are held to be subject to abatement. *Wetmore v. St. Luke's*, 56 Hun. 313.

Bequests for the support of education may abate. *Waters v. Collins*, 3 Dem. Surr. 374.

A legacy for the support of testator's wife and child has been held not to abate with the general legacies. *In re Chauncey*, 119 N. Y. 77.

Legacies for charitable purposes subject to abatement when the legacy is not the only support of the beneficiary. *Matter of Wenner*, 125 App. Div. 358.

As to preference of legacy for support or education of near relative not otherwise provided for, see *Scofield v. Adams*, 12 Hun, 386.

A legacy to a creditor in satisfaction of his debt entitled to priority over general legacies which are mere bounties, even though the bequest greatly exceeds the value of the right relinquished. *Orton v. Orton*, 3 Abb. Dec. 411.

No priority to a legacy to an executor for his trouble in administering the estate. *Waters v. Collins*, 3 Dem. Surr. 374.

The words "for care and pains" do not of themselves confer priority. *Morris v. Kent*, 2 Edw. 175.

A bequest for the saying of masses will not be abated. *Sherman v. Baker*, 20 R. I. 613.

A bequest to a cemetery providing for the care of testator's lot will not abate. *Matter of Hinman*, 32 Misc. 536, 2 Mills Surr. 1.

Specific legacies are preferred over general legacies. *Taylor v. Dodd*, 58 N. Y. 335.

As between specific devises and specific legacies, the latter abate first under the common law rule. *Rogers v. Rogers*, 1 Paige, 183.

Where demonstrative legacies are charged upon a particular fund, they abate ratably with specific legacies, so far as the fund will extend for their payment. *Florence v. Sands*, 4 Redf. 206.

But where, by reason of the total or partial failure of the fund upon which the specific legacies are charged, it is necessary to resort to the general estate for payment, the legacies are regarded as general, and must abate pro rata with the other general legacies. *Matter of Warner*, '39 Misc. 432.

A bequest of an annuity charged on personalty is a general legacy which abates proportionately with other legacies and with the property on which it is charged in case of deficiency. *Petrie v. Petrie*, 7 Lansing, 90.

An annuity in lieu of dower has a preference on insufficiency. *Rowe v. Lansing*, 53 Hun, 210.

A specific legacy of the amount due a testatrix upon a bond and mortgage, held by her on the premises of the legatee, is not subject to the abatement where it appears that it represents money which she had offered him, a person whom she had informally adopted as a son when he was two years old and whom she had supported and educated during his minority, she receiving his wages, in order to enable him, after she had become a widow, to build a house, with rooms to suit her, in which she and he and his wife might live together and in which she did live for seven years and was living when she made her will. *Matter of Brown*, 4 Mills Surr. 162.

Where the assets prove insufficient to pay in full general legacies made to volunteers, a trust provision for the life support of a brother, otherwise

unprovided for by the will, but not dependent upon the testator in his lifetime, abates proportionately with all the other general legacies, as the relationship of a brother is too remote to except the bequest for his benefit from the general rule. *Matter of Hinman*, 2 Mills Surr. 1.

DEDUCTION, ADJUSTMENT AND EQUALIZATION OF PAYMENT.

The abatement must be proportionate. *Lyons v. Steinhardt*, 37 Misc. 628.

A payment to one larger than that to others should be equalized out of the estate. *Matter of Meyer*, 95 App. Div. 443.

One omitted on one partial distribution should be made equal with others when further assets are discovered. *Hotaling v. Marsh*, 132 N. Y. 29.

Matter of the Judicial Settlement of the Account of THEODORE F. MILLER and THOMAS P. CLARK, as Executors of the Last Will and Testament of MARY F. FARNHAM, Deceased, of Her Acts and Proceeds as Executrix of the Last Will and Testament of STEPHEN H. FARNHAM, Deceased.

(*Surrogate's Court, Kings County, July, 1909.*)

EXECUTORS AND ADMINISTRATORS: RIGHTS AND LIABILITIES BETWEEN REPRESENTATIVE AND ESTATE—ITEMS CHARGED OR CREDITED—LOSS FROM IMPROPER INVESTMENTS OR FAILURE TO INVEST—LOSS ON FUNDS IN HANDS OF EXECUTRIX AS LIFE TENANT: ACCOUNTING AND SETTLEMENT; FORM, REQUISITES AND CONTENTS OF ACCOUNT AND PETITION FOR ALLOWANCE—SEPARATION OF ITEMS FOR DISBURSEMENTS; CONTEST, OBJECTIONS AND HEARING AND SETTLEMENT THEREOF—BURDEN OF PROOF: DISTRIBUTION AND DISPOSAL OF PERSONAL ESTATE—INTEREST ON LEGACIES AND SHARES—INCOME, ANNUITIES AND ARREARS THEREOF.

GIFTS—DELIVERY AND ACCEPTANCE: IN GENERAL: EVIDENCE—INCONSISTENT ACT OF DONEE.

WILLS—INTERPRETATION AND CONSTRUCTION—TERMS CREATING LEGACIES AND GIFTS OF INCOME, ETC.—RULES AND IMPLICATIONS—ANNUITIES OR INCOME—DEFINITION AND CONSTRUCTION.

By her husband's will, of which the testatrix herein was executrix, she was given in lieu of all dower or claim thereto the residuary estate for life "to possess, use and occupy the same, or any portion thereof, and to receive to her own use and benefit all of the rents, profits and income therefrom." At his death the husband was a member of a partnership whose capital and accrued profits were in the hands of R. & Co., through which certain ventures of the partnership were conducted. Upon the judicial settlement of the accounts of the executors of the deceased executrix, one of her residuary legatees claimed that the provision of the testator's will, that his wife should have the "rents, profits and income" of the residuary estate, gave to her the profits from the business conducted through R. & Co. which accrued between testator's death and the time when the transactions were liquidated.

Held, that upon the testator's death the partnership was dissolved and the surviving partner became the legal owner of all the firm's assets including the profits to accrue during the period of liquidation and that the sums received by the executrix in settlement of the partnership accounts were principal either for the purpose of administra-

tion or for the purpose of investment and enjoyment by her as life tenant.

Where certain bonds which belonged to the partnership were given by the testator to his wife in his lifetime but she long treated them as part of the assets of that estate, the sum at which they came into her hands as executrix in settlement with the surviving partner and the firm of R. & Co. must be regarded as part of the sum received from the surviving partner and she was chargeable therewith as executrix.

Where testator's wife, upon receiving the amount of a savings bank account standing in her testator's name until his death, receipted therefor as executrix, a letter by testator to her written on the eve of a yachting trip indicating either an intention that the account should belong to her or an assurance that it did belong to her is insufficient evidence of delivery which was essential to a gift either *causa mortis* or *inter vivos* of the account.

Where the executrix sold certain bonds belonging to her testator's estate, her statement in her account that the proceeds of such sale were embraced in the schedule of her general cash receipts must prevail in the absence of proof to the contrary and the burden is upon the objectant to show that she had not accounted for all moneys received by her.

Where, upon the settlement with the firm of R. & Co., there was deducted from \$15,610.70, the amount they owed to the testator's estate, the sum of \$2,659.91 for their charges against said estate, an allowance therefor will be approved though displayed in the account of the executrix as a disbursement.

By the testator's will, in case the net income of his personal estate, aside from certain annuities, was less than \$5,000 in any year during the lifetime of his wife, she, as executrix, was authorized to sell and dispose of such portion of the personal estate as might be necessary to provide her with an annual income of \$5,000 or so much thereof as might be necessary for the payment of personal and living expenses in the style to which she had been accustomed. It appeared by the accounts of her executors that there was paid to her for the four years following her husband's death \$14,900 and that the net income from the personal estate for the same period was but \$7,430.54. It further appeared that the firm enterprises while in process of settlement made more than four per cent. profit at which rate the income upon the testator's estate was more than the sum which his wife used for her support. *Held*, that, while the sums received by her in liquidation were necessarily principal and she was, therefore, excluded from the enjoyment of any unusual commercial profit made during liquidation, she could properly apply to her own maintenance so much of the actual profit thereof as was necessary for her sustenance during the period of

liquidation. She was entitled to interest on her legacy for maintenance, if it was earned; and as she did not exceed this allowance, the amount of \$7,469.46, the difference between the net income and what she had received, charged in the account as principal, though disallowed in that form, is properly charged to the income which was included in the amounts received from the surviving partner.

The surrogate has no power to charge to testator's wife as his executrix the loss which she as life tenant alone may have incurred by the investment of funds in improper securities, and her account as executrix cannot be surcharged with such losses.

Modified 138 App. Div. 885.

Proceeding upon the judicial settlement of the account of executors.

Dykman, Oeland & Kuhn, for accounting executors; James C. Church, for administrator C. T. A. of Stephen H. Farnham; Henry Wynans Jessup, for M. Elizabeth Truslow, residuary legatee of Mary F. Farnham; Studin & Sonnenberg (William Reeda, of counsel), for Levi G. Farnham, Ida H. Cardy and Minnie D. Trenear, next of kin and residuary legatees of Stephen H. Farnham.

KETCHAM, S.—This is an accounting by executors of a deceased executrix. The will of the original decedent, after providing for certain annuities, proceeds in part as follows:

"Third. All the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath to my wife, Mary Frances Farnham, for and during her natural life, to possess, use and occupy the same, or any portion thereof, and to receive to her own use and benefit all of the rents, profits and income therefrom. The provisions of this will in favor of my said wife are to be accepted by her in lieu of all dower or claim of dower upon my estate."

The wife was appointed executrix and as such she qualified and remained in office until her death. The husband (testator)

at his death was in partnership with C. S. Bowers in certain ventures which were conducted through the firm of Ropes & Co. The capital of the decedent's firm, as well as any profits accrued at the time of his death, was in the hands of Ropes & Co.

First. It is claimed by a residuary legatee under the will of Mrs. Farnham that Mr. Farnham's will, in its provision that she should have the "rents, profits and income" of the residue gave to her the mercantile profits from the business conducted through Ropes & Co., which accrued between his death and the time when the transactions were finally liquidated. This claim is stated by counsel as follows: "Mr. Farnham's will gave his wife the profits on the Ropes business during the period of liquidation."

At the death of Mr. Farnham no right or interest in the firm assets passed to his representatives, nor was there any such right or interest which could be disposed of by his will. He had no such right touching the property of his partnership that he could bequeath its profits. He did not have them to give. Upon his death his firm was dissolved, the surviving partner became the legal owner of all the firm assets, necessarily including profits to accrue during the period of liquidation, and the estate of the deceased partner had nothing but the right to an account and to such sum as might be found upon the account to be due from the survivor. This was merely an equitable chose in action against the surviving partner, and any sum which might be paid in solution thereof would pass without brand or earmark to distinguish profits from principal. It was in the hands of the estate nothing but principal.

The profits upon the residue which the will contemplated could only be such profits as might result after its receipt by the executrix and its delivery to herself as life tenant. The will speaks only of the profits of the residue, and the fund in

question could not reach the residue until the liquidating partner paid his equitable indebtedness to the estate.

True, there is a rule under which interest from the time of the death of the testator is sometimes held to be payable, where the beneficiary is the primary object of the testator's consideration or the provision is for maintenance, and this case was within the rule, even if the fund was not reduced to the possession of the executrix for some time; but the benign fiction that the estate as such has been yielding a profit, artificially fixed at the ordinary rate of interest, before it has actually become the subject of administration, is no warrant for passing over to the life tenant the commercial profit which accrued during liquidation of the decedent's partnership affairs. The sums received in settlement of the partnership accounts must be regarded as principal, either for the purpose of administration or for the purpose of investment and enjoyment as life tenant.

Second. The claim is made that forty United States bonds were given by Mr. Farnham to his wife during his lifetime. Testimony is given of Mr. Farnham's declaration that he had given \$40,000 worth of bonds to his wife, and this declaration doubtless related to the bonds in question. Against this is the unquestionable fact that the wife received and long treated the bonds as part of the assets of her husband's estate, though she later asserted her individual ownership and deposited and registered them as hers.

If it were necessary to resolve this conflict of evidence, her conduct as to the securities would be held to overcome the testimony of testator's declaration. But the trouble with the theory of a gift is that Mr. Farnham did not own the bonds. They belonged to the firm of Farnham & Bowers and were not the subject of his donation. They came into the hands of the executrix at the sum of \$48,650, in settlement with Mr. Bowers and the firm of Ropes & Co., and must be regarded as part of the sum received from Mr. Bowers as surviving partner.

Third. There was an account in the Seamen's Savings Bank which stood in the name of Mr. Farnham from a time prior to June 29, 1880, until his death. The executrix received the amount remaining on deposit in this account and gave her receipt therefor as executrix. Her residuary legatee insists that this account was given to Mrs. Farnham by her husband in his lifetime and in this regard relies upon a letter from Mr. Farnham to his wife, which is as follows:

" New York, June 29, 1880.

" My Dear Wife:

" As I am going yachting for a few days, it may be well to make a brief statement of my affairs.

" A tin box in the ' Burglar ' of R. W. Ropes & Co.'s safe at office contains your Naumkeag Stock ctfee, also two \$1,000 coupon Republic Valley R. R. bonds, also two \$1,000 or one \$2,000 Redg. U. S. 4% Bond ctfee; in my Small Ledger, in drawer of safe as above, you will find my Seamen's Bank Book, also ctfee for 100 Sharon Spring Valley Hydraulic Gold Company. The Republic Valley bonds and the U. S. 4% Bonds, above, are your personal property, although in my name. The Savings Bank Book as above is wholly yours although in my name.

" My will is in the ' Burglar '—above—leaving you my entire property.

" I wish to make one request of you, viz. to immediately execute proper legal documents bestowing property obtained from me to my heirs at law—at your decease. And during your life to assist my sisters Mary and Lucy should they become needy.

" Your husband,

" S. H. FARNHAM."

There is no proof of the delivery of the supposed gift, unless it be contained in the letter quoted. If a gift *causa mortis* was made in view of the impending dangers of a yachting trip, the gift failed upon the donor's safe return. There is no evi-

dence of delivery, and delivery was necessary to effect a gift, either *causa mortis* or *inter vivos*.

The letter bespeaks either an intention that the account shall belong to the wife or an assurance that it already belongs to her. In neither case can it be taken to evidence or effectuate a delivery.

A statement by a depositor that an account standing in his name, represented by a book remaining in his possession, is the property of another, does not tend to show a previous delivery or assignment of the subject of the alleged gift.

It is consistent with a conviction on the part of the supposed donor that his declaration alone is sufficient to establish a prior gift. If this were the only effect of the letter it would afford no proof that there had been the delivery which the transaction required; and, if the statement to the wife "the account is already yours" could be held to have any tendency to show a former delivery, it would be overborne by the fact, inconsistent with a completed gift, that the account still stood in the husband's name and that the book, which was the only subject of a manual delivery, was at the time of the declaration in his small ledger in the drawer of a safe belonging to his employers.

Regarded, not as a rehearsal of a transaction previously consummated, but as a possible gift resulting from the instant of the letter, there is still the lack of delivery and the affirmative evidence that no delivery was made because the bank book, the only symbol of ownership, remained in the supposed donor's hands not only then but throughout his life. The harsh result is that there was but an abortive intent to give and no gift.

Fourth. It is objected that the deceased executrix sold Keokuk and Des Moines bonds for \$1,573.12, and that her estate is not charged therewith in this account. The statement in Schedule D of this sale furnishes no basis for a surcharge. That schedule is not a record of receipts and disbursements. It is a report only of investments, their course and management and

the amount thereof remaining in the hands of the executrix at death.

In Schedule A the accountants carry the receipts of the executrix; and that schedule, under their verification, purports to show the full amounts from all sources received by their decedent. *Non constat* but that the proceeds of the Keokuk bonds are embraced in the schedule, and indeed the account asserts that they are so embraced. Its averment in this respect must prevail in the absence of proof. The accountants say that they have answered for all moneys received. An objection is made that they have not. The burden upon the issues so formed is on the objectant, and it is not sustained.

This result is not disturbed by the fact that, as to the sale of another security set forth in Schedule D, the accountants, in Schedule E, charge themselves with its proceeds. This treatment of the security last mentioned does not gainsay the oath of the accountants that as to the price of the Keokuk bonds they have accounted in Schedule A.

The natural meaning of the whole account is that, as to the first mentioned investment, its proceeds are to be found among the general receipts of cash; while, as to the other, not being found in Schedule A, it must be the subject of special account.

Fifth. The two items in Schedule B, amounting to \$2,659.91, for allowance to Ropes & Co., should be approved. These items, though displayed as disbursements, appear in an account rendered by Ropes & Co. as charges against the estate, to be taken in deduction of \$15,610.70, the balance which would otherwise have been payable by them. The accountants, instead of charging their decedent only with the balance found upon a subtraction of these two items, have first charged her with the erroneous balance and then credited her with the two items as for a disbursement. The account proves, the parties concede, and the court finds that Ropes & Co. made full settlement. It is found that they did not pay more than they owed; and the ac-

count, therefore, must be settled upon the theory that either only \$12,950.79 was received by the executrix, or that, if she received the greater amount, she paid back in the same transaction the \$2,659.91.

Sixth. The fourth paragraph of the will is:

"Fourth. In case the net income from the personal property of my estate over and above the aforesaid annuities to my sister shall be less than five thousand dollars in any year during the lifetime of my said wife, I hereby authorize my executrix to sell and dispose of such portion of my personal property as may be necessary to provide for an annual income from my personal property to my said wife of five thousand dollars in each and every year, or so much thereof as may be necessary for the payment of personal and living expenses in the style to which she has been accustomed."

The accountants show that there was paid to the widow for the four years following her husband's death, \$14,900, and that the net income from the personal property of the estate for the same period was \$7,430.54. They, therefore, claim that the balance, \$7,469.46, was properly paid out of principal.

The provision quoted was for the maintenance of the wife and her life estate, therefore, began at the death of the testator, and her right to the income which a trustee's investment of this residue would normally afford attached at the time of her husband's death. *Cooke v. Meeker*, 36 N. Y. 15; *Rodman v. Fincke*, 68 id. 239; *Matter of Bainbridge*, 61 Misc. Rep. 563.

During the period of liquidation, while the substance of her husband's estate was not yet reduced to her possession as executrix, she was entitled to at least four per cent. upon the personality, from her husband's death, if it yielded income equal to or greater than that rate.

It is clear that the firm enterprises, while in process of settlement, made more than a four per cent. profit and that the increment at that rate upon the share of which Mr. Farnham

died possessed was more than the sum which Mrs. Farnham used for her support. While, therefore, the sums received by her in liquidation were necessarily principal and she was therefore excluded from the enjoyment of any unusual commercial profit made during liquidation, she could properly apply to her own maintenance so much of the actual profit thereof, during liquidation, as was necessary for her sustenance during that period. She was entitled to interest on her legacy if it was earned. She did not exceed this allowance, and the amount of \$7,469.46, charged in the account to principal, though disallowed in that form, would be properly charged to the income which was included in the amounts received from the surviving partner. The result would be the same, and the present form of the account presents no real objection.

Seventh. It is thought to surcharge the account with losses arising from the investment by Mrs. Farnham in improper securities. It is apparent that, in the respects complained of, the investments were not of the class to which executors and trustees should generally be confined; but the fund was in the hands of the widow as life tenant, and not as executrix, and as life tenant she made the investments.

Although subject to debts and the expenses of administration, the personal estate left by Mr. Farnham was given to his widow to "possess, use and occupy the same and to receive all the income therefrom." Had she accounted in her lifetime as executrix, as well she might, her account would not have been concerned with the character of the investments. As executrix she would not have been liable for waste. The surrogate would have had no cognizance of her personal conduct as life tenant and certainly would have had no power to charge upon her as executrix the loss which as life tenant alone she may have incurred. Had the remaindermen asserted a grievance against her for waste, it would necessarily have assumed the form of an action against her, not as executrix, but personally, for her conduct as life tenant.

Her executors are accounting only in her place and only as to her acts and doings as executrix. Code Civil Pro., § 2606. The jurisdiction of this proceeding is defined as the same which the court would have against the decedent executor if his letters had been revoked (same section).

If this were the account of the executrix, made by herself, it would not embrace her conduct or liability as life tenant and she would not be subject to surcharge for waste if proven. *Matter of Blauvelt*, 131 N. Y. 249. The same rule must control the accounting made for her and assimilated to her own in its scope and limitations.

Eighth. In this view the account is incorrect, so far as it charges the accountants with the sums which were delivered by the executrix to herself as life tenant. As executrix she did not die possessed of these sums. By the will they were left to the remaindermen upon her death and passed to the administrator with the will annexed, subject to the duty on his part of seeing that they reached their destination.

This does not apply to items which were considered by the executrix as her own, but which are found to have belonged to the estate. These must be regarded as assets held under administration when she died, but the amounts which were merged in the life estate must be credited as sums paid to the life tenant.

Ninth. The item of \$71.11 in Schedule E is disallowed.

Tenth. The objection that the account does not contain a charge against the executrix for the furniture in the house of her husband at his death is overruled. The best result that the evidence yields is that this furniture belonged to Mrs. Farnham.

Decreed accordingly.

NOTE ON CURTESY.

(See Matter of Starbuck, p. 148, ante.)

DEFINITIONS.

Is a freehold estate in the husband for his natural life, cast upon him by operation of law immediately upon the happening of the necessary incidents. *Shortall v. Hinckley*, 31 Ill. 219.

Is in the nature of a continuation of the wife's inheritance, and is subject to the same encumbrances under which she held the estate. *Watson v. Watson*, 13 Conn. 83.

Any circumstances which would have determined her estate if living will determine *Est.* *Withers v. Jenkins*, 14 S. C. 597.

The estate which by common law a man is entitled to upon the death of his wife, in the lands or tenements of which she was seized in possession in fee simple or in tail during their coverture, provided always that there was of their marriage lawful issue born alive which might have been capable of inheriting the estate. *Billings v. Baker*, 28 Barb. 343.

CURTESY INITIATE.

Immediately upon the birth of lawful issue of the marriage, born alive and capable of inheriting the estate of the wife, her husband acquires, unless it be otherwise provided by statute, a permanent interest in all the estates of inheritance of the wife, of which she has been or may become seized during coverture. *Billings v. Baker*, 28 Barb. 343.

The courts will not disturb the vested marital rights of the husband when he is not guilty of any conduct that would entitle his wife to a divorce. *Van Duzer v. Van Duzer*, 6 Paige, 366.

The statutes of New York affecting the rights of married women have the effect of abolishing curtesy initiate in all the property of the wife acquired after their enactment. *Hurd v. Cass*, 9 Barb. 366.

Tenancy by curtesy initiate is no longer a certain interest in lands, since statutes have been passed permitting the wife to dispose of her estate therein. *Matter of Clark*, 40 Hun, 223.

A recovery in ejectment by husband and wife, or a decree in partition settling their rights to an undivided portion of the land, gives the husband such a seizin in law as to make him tenant by the curtesy initiate. *Ellsworth v. Cook*, 8 Paige, 643.

REQUISITES.

Necessary that there be a legal marriage, sufficient seizin of the wife of an estate of inheritance during coverture, birth of issue, born alive capable

of inheriting the estate, and death of the wife before that of the husband. *Ferguson v. Tweedy*, 56 Barb. 168.

If the marriage is absolutely void in law, the husband will not be entitled to curtesy even if the other requisites exist. *Wells v. Thompson*, 13 Ala. 793.

The lawful issue must be born alive during the lifetime of the mother; that it is alive *in ventre sa mere* and is delivered after the death of the mother is not sufficient. *Marsellis v. Thalheimer*, 2 Paige, 35.

The husband must survive the wife. *Jackson v. Johnson*, 5 Cow. 74.

Where an estate descends to a daughter who is a *feme covert*, and who dies in the lifetime of the mother to whom dower in the premises is subsequently assigned, the husband of such daughter will not be entitled to an estate by the curtesy in the third of the premises which is thus assigned to the widow of his wife's father, for dower; even after the termination of the life estate of such widow in that third of the premises. *Howells v. McGraw*, 97 App. Div. 460.

Where land was conveyed to a wife subject to a life estate, and such life estate had not terminated at the time of the death of the wife, held that the husband was not entitled to curtesy in the land, as seizin in fact as well as in law by the wife was wanting. *Collins v. Russell*, 96 App. Div. 136.

Where a man dies intestate leaving a wife and four children who subsequently convey to the widow a life estate in their father's real property, and where one of the children dies before the widow leaving a husband to whom she had borne children, such husband becomes entitled to curtesy in two-thirds of a fourth interest in such realty, as his wife was actually seized thereof at the time of her father's death, but the husband is not entitled to curtesy in the remaining one-third of such quarter interest because the dower interest of his wife's mother prevented actual seizin by the wife. *Valentine v. Hutchinson*, 43 Misc. 314.

Birth of issue, prior to the passage of the Married Women's Act, 1848, ch. 200, as amended by the Act of 1849, ch. 375, did not give a husband such a vested right in property subsequently acquired by the wife, that she cannot deprive him thereof by will. *Matter of Mitchell*, 61 Hun, 372.

Where a married woman, seized of real estate, has issue of the marriage born alive, and dies, without disposing thereof, her husband becomes entitled to an estate therein, as tenant by the curtesy, which will pass to a receiver of his property. *Beamish v. Hoyt*, 2 Rob. 307.

To entitle a husband to an estate as tenant by the curtesy, the wife must be seized in fact and in deed; a seizure in law is not sufficient. *Tayloe v. Gould*, 10 Barb. 388.

A *feme covert* has such possession of wild and uncultivated lands as to enable her husband to become tenant thereof by the curtesy. *Beekman v. Sellick*, 8 Johns. 262.

Where a testator devises his real estate to a daughter, and directs his executors to sell, and the daughter marries and has a child, which dies, and the mother also dies before a sale, leaving a husband, he is entitled as tenant by the curtesy, to an interest in the proceeds, during life, in lieu of the rents and profits. *Dunscomb v Dunscomb*, 1 Johns. Ch. 508.

Where land is devised to a woman for life, remainder over, her husband is not entitled to curtesy in the premises. *Young v. Geisenheimer*, 7 Daily Reg. 373.

The common-law rule that if a wife claims lands by devise or descent, and dies before entry, the husband does not have curtesy, applies in this State. *Carr v. Anderson*, 6 App. Div. 6.

Where the legal title is in a trustee for the benefit of his wife, the husband is not entitled to curtesy. *Bevins v. Riley*, 24 Weekly Digest, 35.

The words "heirs or assigns" being no longer necessary to convey an estate in fee, and common-law fee tails having been converted into fee-simple estates, where a will provides "I give and bequeath to A., wife of B., all of the remaining property which I may have after my estate has been settled and all the above legacies complied with, to her and her child or children; should the said A. die without leaving any child or children, then the above legacy to be given to B., to him and his heirs forever," it was held that the devisees took a fee, and her husband became tenant by the curtesy. *Kirk v. Richardson*, 32 Hun, 434.

The husband of one of the heirs of an intestate is not tenant by the curtesy of lands which has been set apart to the widow for her dower; a seizin in fact by the wife is necessary thereto. *Graham v. Luddington*, 19 Hun, 246.

ESTATES SUBJECT THERETO.

Where the wife takes by devise an estate in fee, limited by an executory devise which defeats or abridges the fee in case of the happening of a certain event, the seizin and estate which she has will give the husband curtesy. *Hatfield v. Sneden*, 54 N. Y. 280.

A man died intestate leaving him surviving a widow and several children, one a daughter who married and had issue who died. The widow survived the daughter who died intestate leaving her husband surviving. Previous to her death she, together with the other heirs, had executed a deed by which their respective interests were declared and defined as follows: That the widow was entitled to one-third of the net rents of the premises, and that each of the children were seized of a full undivided seven-thirtieth part therein. Held, in partition, that the value of the curtesy of the husband was the seven-thirtieth part belonging to his wife, after deducting the proportionate part of the widow's dower. *Howells v. McGraw*, 97 App. Div. 460.

A deceased wife was survived by her husband, mother and one brother only, and she died possessed of real estate in fee simple. Held, that the proportion descended to the mother for life with reversion to the brother subject to the curtesy of the husband, and where the mother conveyed to the husband subject to his curtesy, and the brother and his wife quit-claimed to said husband, the curtesy, if any, was merged in the higher title. *Berger v. Waldbaum*, 46 Misc. 4.

General effect of married women's acts is to give them the power to deal with their property during coverture in the same manner as if unmarried, and to entitle the husband to curtesy only in such estates of inheritance as the wife possessed at her death undisposed of by will when given power to devise. *Lansing v. Gulick*, 26 How. Pr. 250.

The vested marital interest of the husband not affected by the Married Women's Acts. *Smith v. Colvin*, 17 Barb. 157.

Where the instrument of conveyance gives the wife power to appoint and she exercises the power, the husband is not entitled to curtesy. *Pool v. Blakeie*, 53 Ill. 495.

No curtesy in a mere equitable right which does not amount to an estate. *Sentill v. Robeson*, 55 N. C. 510.

No tenancy in husband of a remainder or reversion of his wife expectant on an outstanding particular freehold estate, unless such estate falls into the inheritance during coverture. *Tayloe v. Gould*, 10 Barb. 388.

The husband is tenant by the curtesy of a vested remainder in fee. *Young v. Langbein*, 7 Hun, 151.

Where the particular life estate and the immediate reversion unite in a married woman during coverture, her husband is entitled to curtesy therein. *Tayloe v. Gould*, 10 Barb. 388.

Where wife is heir in fee to realty in which her mother has a dower, her husband will not have curtesy in such realty if the wife's mother be living at her death. *Gibbs v. Esty*, 22 Hun, 266.

The right of quarantine of a widow before dower is assigned will not bar curtesy. *Mettler v. Miller*, 129 Ill. 630.

If the estate of inheritance of the wife be upon a limitation by the happening of which the estate of the wife is terminable at common law, the husband will not be tenant by the curtesy in such estate if terminated during the life of the wife. *Harvey v. Brisbin*, 143 N. Y. 151.

Where a testator directed that his estate remain in the control of his executors for the use of his wife and children, and after the youngest grandchild should arrive at the age of twenty-one years, that it be divided, it was held that a daughter of testator who was of age when he died, and who died before the youngest grandchild arrived at the age of twenty-one years, never had such an estate as to entitle her surviving husband to curtesy. *Burke v. Valentine*, 52 Barb. 412.

Curtesy attaches to the separate estate of the wife conveyed to a trustee

by her husband for her sole and separate use, and to estates conveyed to her by her husband without the intervention of a trustee. *Vanderveer v. Vanderveer*, 1 N. Y. Suppl. 897.

TENANT'S RIGHTS AND LIABILITIES.

May defend against one deriving title from the wife and suing for possession. *Grant v. Townsend*, 2 Hill, 554.

The husband may convey his interest by the curtesy in his wife's estates of inheritance without the wife joining in the deed. *Shortall v. Hinckley*, 31 Ill. 219.

Rents and profits derived from the wife's estate subject to the curtesy of the husband belong absolutely to him. *Muldowney v. Morris*, 42 Hun, 444.

Where an infant owns real property, the father stands as guardian in respect thereto, and where he is also tenant by the curtesy therein, it is his duty to pay the interest on incumbrances out of the rent, and where he procures the property to be sold under a paramount lien, and the property is bought in by his wife, the court will adjudge the infant to be the owner of the property, subject to the estate by the curtesy and the liens, and will require an accounting for the rents and profits. *Monzani v. Monzani*, 27 Abb. N. C. 67.

Where estates of the wife to which curtesy has attached are sold under a power of sale, or misapplied by an executor, or taken under the power of eminent domain, the husband is entitled either to the income from the purchase price, or to a sum equal to the present value of his estate, as determined by the rules for ascertaining the present value of life estates. *Benedict v. Seymour*, 11 How. Pr. 176.

A settlement by the husband of his estate by the curtesy initiate upon his wife will not be valid as against his creditors. *Wickes v. Clarke*, 8 Paige 161.

HOW BARRED, RELEASED, OR FORFEITED.

A deed by a tenant by the curtesy, although purporting to convey a fee, passes only a life estate, when it is affirmatively shown that the grantor had only an estate for life, and when the form of conveyance used by him carries only such estate as he had. *Jackson v. Mancius*, 2 Wend. 355.

A husband's conveyance of land in ignorance of his wife's interest therein does not release his right. *Farrand v. Long*, 184 Ill. 100.

A tenant by the curtesy cannot convey or release to the heir the lands of the wife held adversely to both, although the heir be his child. *Vroom v. Shepherd*, 14 Barb. 441.

An estate in remainder was vested in the wife, the enjoyment of which was to commence at the death of her mother, the particular tenant. It was held that if she or her issue survived the mother, the husband will have such an equitable tenancy by the curtesy therein as will pass by an assignment of his property, under the insolvent law in the lifetime of the mother. *Gardner v. Hooper*, 3 Gray (Mass.) 398.

A release of curtesy, executed under section 2362 of the Code of Civil Procedure, running to either of two prospective purchasers, and obtained from the father by the special guardian of his infant children, without any payment made by the purchasers, but upon the parol understanding between the guardian and the father that his curtesy should follow and attach to the proceeds of the sale when made, confers no right on said purchasers. *Matter of Baird*, 30 Misc. 668.

Where the land of a married woman was taken for a public improvement and she died intestate and left a husband and four infant children, and the husband was appointed guardian of the children and gave the statutory bond, and he received the award for the entire fee and receipted therefor as guardian, it was held, in an action brought by one of the children, when he arrived at age, for an accounting, that the husband was not estopped by the fact that he signed the receipt as guardian, and that the petitioner had no right to demand immediate payment of his share when he came of age. *Matter of Camp*, 126 N. Y. 377.

An ante-nuptial agreement executed in Connecticut relating to real estate situated in New York provided that the husband in the event of his wife's death would not claim to have any right or interest in or to any part of her real estate or any of her income, but would permit the same to pass by her will to her devisees, or by descent to her heirs at law as the same would pass had she remained single and unmarried. Held, that the agreement was valid, and constituted a bar to any tenancy by the curtesy upon the part of the husband in the lands in New York, and that the heir could recover such premises in fee simple. *White v. White*, 20 App. Div. 560.

Where an interlocutory judgment in partition directed a sale of the premises and it was provided that the life estate of one of the defendants, a tenant by the curtesy, be included in the sale, the referee to pay out of the proceeds of sale "a gross sum in satisfaction of tenancy by the curtesy, to be fixed according to the principles of law applicable to annuities" and after the entry of said judgment and before a sale, the said defendant died, it was held, that thereafter upon motion, the judgment was properly amended by striking out the provision in reference to said life estate, as upon the death of said life tenant his interest terminated. *Mingay v. Lackey*, 142 N. Y. 449.

Where the lands of the wife were adversely held during coverture, the husband will not be entitled to curtesy. *Baker v. Oakwood*, 49 Hun, 416.

Curtsey is defeated by a sale of the wife's estate under legal process for the wife's debts. *Stewart v. Rose*, 50 Miss. 776.

A wife's real property, where there is no personal property, is liable for her debts, freed from the right of curtesy. *Arrowsmith v. Arrowsmith*, 8 Hun, 606.

SUITS BY AND AGAINST THE TENANT.

A tenant by the curtesy may bring summary process for the recovery of the deceased wife's lands from a tenant holding under a lease from the wife. *Mack v. Roche*, 13 Daly, 103.

May bring action in his own name for ejectment to recover possession of his wife's property embraced in his estate. *Spaulding v. Cleghorn*, 8 Suppl. 269.

A tenant by the curtesy of his deceased wife's undivided share in land may sue for partition. *Tilton v. Vail*, 53 Hun, 324.

Tenancy by the curtesy may be set up by a stranger in bar of a recovery by the heir. *Adair v. Lott*, 3 Hill, 132.

Matter of the Judicial Settlement of the Estate of JOSEPH F.
BARTON, Deceased.

(Surrogate's Court, Oneida County, July, 1909.)

**EXECUTORS AND ADMINISTRATORS—DISTRIBUTION AND DISPOSAL OF PERSONAL
ESTATE—COMPUTATION AND ADJUSTMENT OF INTERESTS AND DISCHARGE
THEREOF—COMPUTATION OF SHARES OR DISTRIBUTIVE FUNDS.**

By the sixteenth clause of a will disposing of an estate of nearly \$900,000, it was provided that, in case the sum of the bequests to six charitable corporations, to each of which was given \$30,000, should exceed in value one-half of the personal estate of which the testator died seized and possessed, the executors should take such a proportionate sum from each of such bequests as would reduce the sum of all to one-half of the personal estate. By the next clause it was provided that, in case the sum of all such bequests should not equal in value one-half of the personal estate of which the testator died possessed, the executors should add such an equal sum to each of such bequests as would cause the sum of all such bequests to equal in value one-half of the personal estate. All the rest, residue and remainder of the property of which the testator died seized and possessed, or which might come to the estate after his death "and not herein disposed of," was directed to be divided by the executors into five equal parts. Upon the judicial settlement of the accounts of the executors, held, that the testator intended that his estate should be valued as of the time of his death and that one-half of its value should be used to pay the legacies to the charitable institutions.

Proceeding upon the judicial settlement of the account of
executors.

W. A. Matteson, for Seth Barton, David W. Barton and Charles B. Miller, executors; E. A. Rowland, special guardian for Mildred A. Peck, minor; C. Lansing Jones, for Home for Aged Men and Couples; Charles A. Miller, for Home for the Homeless; Charles B. Mason, for House of the Good Shepherd; Charles A. Talcott, for Utica Orphan Asylum; Julius T. A. Doolittle, for St. Luke's Home and Hospital.

Sexton, S.—On the 16th day of February, 1908, said Barton died, leaving a will dated April 9, 1904, which was probated March 30, 1908. On June 16, 1909, the executors filed their annual account. On the return of the citation, June 28, 1909, Home for Aged Men and Couples, Home for the Homeless, House of the Good Shepherd, Utica Orphan Asylum and St. Luke's Home and Hospital, legatees, filed objections to the account which require a construction of the will.

By its terms the testator gave \$30,000 to each of the following named institutions of Utica, N. Y.: Home for Aged Men and Couples, Home for the Homeless, House of the Good Shepherd, St. Luke's Home and Hospital, St. Elizabeth's Hospital, and the Utica Orphan Asylum. He gave \$20,000 each to the American Home Missionary Society, the American Female Guardian Society, and Home for the Friendless, and \$1,000 to Mary Stewart.

The executors were directed to pay all debts, funeral and testamentary charges, and to use \$1,000 for a monument, and \$5,000 was given to them in trust for certain specified purposes. The testator then said:

"Sixteenth. In case the sum of all the bequests above made should exceed in value one-half of the personal estate of which I may die seized and possessed, I hereby direct my executors, hereinafter named, to take such a proportionate sum from the bequests made in Second, Third, Fourth, Fifth, Sixth and Seventh clauses of this my said will, namely the bequests to the Home for Aged Men and Couples, the Home for the Homeless in the city of Utica; the House of the Good Shepherd; St. Luke's Home and Hospital; St. Elizabeth's Hospital and Home; and the Utica Orphan Asylum, as will reduce the sum of all bequests heretofore made in this my will to one-half of my personal estate.

"Seventeenth. In case the sum of all the bequests above made should not equal in value one-half of the personal estate

of which I may die possessed, I hereby direct my executors, hereinafter named, to add such an equal sum to each of the bequests made in the Second, Third, Fourth, Fifth, Sixth and Seventh clauses of this my said will as will cause the sum of all bequests heretofore made in this my said will to equal in value one-half of my personal estate.

"Eighteenth. All the rest, residue and remainder of the property of which I may die seized and possessed, or which may come to my estate after my decease, real, personal and mixed, of every name and nature and wheresoever situated, not hereinbefore disposed of, I hereby direct my executors, hereinafter named, to divide into five equal parts; and I hereby direct my said executors to divide one of such equal parts equally between John M. Barton and Jennie Rowland, the children of my deceased brother, John Barton, or their descendants *per stirpes*."

One-half of the estate of testator, at the time of his death, amounted to much more than the total of legacies; hence, instead of any of the six legacies to charity abating as provided by clause sixteenth, they were each more than doubled under the provisions of clause seventeenth.

From the wording of the sixteenth, seventeenth and eighteenth clauses the executors concluded that the basis for the distribution of the estate, so far as the said six legacies to charity were concerned, was the value of the estate on the day of the testator's death. The inventory as of that date shows \$113,116.06 in cash, \$358,050 in bonds and \$411,772.05 in stock, making the then total estate \$882,938.11.

In course of administration it appears that some securities were disposed of for less than their appraised value, while others were sold for more than their appraised value. An increase in market value at time of sale over the appraised value at time of death of testator of about \$60,000 is shown, with interest and dividends of about \$34,000.

All but St. Elizabeth's Hospital, of the charitable institu-

tions which basked in the sunshine of this good man's bounty, contend that the executors have misconceived the testator's intent, to their great damage and loss, in that the amount of their legacies has been determined by taking one-half of the appraised value of the estate at the time of the testator's death, instead of one-half of the total net estate at time of distribution. This construction, if upheld, would enable the contestants to share with the residuary legatees, under the eighteenth clause of the will, the interest, dividends and increase in market value over appraised value, amounting to about \$94,000.

Which of these contentions is borne out by the language of the will? To my mind, the will as a whole is very clear, and plainly mirrors the testator's intentions.

In construing a will the testator is always a proper subject for consideration. Anything in the record which bears upon his business methods, or mental clearness, may be properly considered in connection with any language used by him in his will for the purpose of ascertaining his intention.

I invoke another rule not laid down in the books, viz.: That courts and judges, in construing wills, as a general proposition, must take men by their words and asses by their ears.

We have under consideration the will of a man by which he disposes of an estate of nearly \$900,000. The inventory shows investments in about eighty different kinds of stocks and bonds, and a cash accumulation at the time of his death of over \$113,000, deposited in eight different banks and trust companies. His investments were so shrewd that the estate in only one instance sustained a total loss, being the amount of five shares of stock in the Buell Tanning Company of Waterville, N. Y., amounting to \$500. With such a man in mind, I feel forced to the conclusion that whatever he said in his will he meant.

Did he intend to give one-half of the value of his personal estate as it stood at the time of his death, as set out in the pro-

visions of his will from the second to the fifteenth inclusive? At the beginning of the sixteenth provision he said: "In case the sum of all the bequests made should exceed in value one-half of the personal estate of which I may die seized and possessed," etc., and at the beginning of the seventeenth provision he said: "In case the sum of all the bequests above made should not equal in value one-half of the personal estate of which I may die possessed," etc., and at the beginning of the eighteenth provision he said: "All the rest, residue and remainder of the property of which I may die seized and possessed." In the three consecutive clauses of his will which are involved in this discussion he used the expression, "of which I may die seized and possessed." From these three expressions, two of them identical in language and all identical in meaning, keeping in mind the character of the man making the will, it seems to me clear that the testator intended that his estate should be valued as of the time of his death, and that one-half of its value should be used to pay the legacies as provided by him in the separate provisions of his will, from the second to the seventeenth inclusive.

If the testator intended that one-half of his net estate should be used in the payment of his bequests at the time of distribution, and the other half go to the residuary legatees under the eighteenth clause of the will, he should have, and, I think, would have said so. That he did not intend to split his estate in two at the time of distribution clearly appears from the eighteenth provision of his will, in which he says: "All the rest, residue and remainder of the property of which I may die seized and possessed," meaning the other half of the appraised value of his estate at the time of his death; "or which may come to my estate after my decease, real, personal and mixed, of every name and nature, and wheresoever situated," meaning lapsed legacies, if any, interest and dividends, he knowing that his estate was largely made up of interest bearing stocks and

bonds; "not hereinbefore disposed of," meaning clearly the half of his estate in value at the time of his death which he had set aside to meet the requirements of the provisions of his will from the second to the seventeenth inclusive.

The expression "not hereinbefore disposed of," in the eighteenth clause of the will, does not mean, in my judgment, that the residuary legatees should share equally the interest and dividends and any other property which might come to the estate with the specific and general legatees. The will, taken as a whole, to my mind, will not stand any such construction.

The intention of the testator, as gathered from the whole will, is to govern. *Quade v. Bertsch*, 65 App. Div. 600, *affd.* in 173 N. Y. 615, without opinion.

When the testator employs language that is clear, definite and incapable of any other meaning than that which is conveyed by the words used, the rules of construction that are invoked in cases of ambiguous wills do not apply. *Wadsworth v. Murray*, 161 N. Y. 274.

The only way that the testator could have prevented interest, income, lapsed legacies, if any, and other property which might come to his estate, from falling into the residuary clause of his will, would have been by the use of words expressly showing an intention on his part to that effect. *Matter of Benson*, 96 N. Y. 500.

The character of the six legacies to charity precludes them from sharing in interest or income of this estate. They are general legacies. A legacy is general, and not specific, when so given as not to amount to a bequest of a particular thing or money of the testator distinguished from all others of the same kind. To make a legacy specific, its terms must clearly require such a construction. The language of each of the six legacies to charities is, excepting name of legatee, "I hereby give, devise and bequeath the sum of thirty thousand dollars (\$30,000) to the 'Home for Aged Men and Couples, situated in the City

of Utica, Oneida County, N. Y.'” *Tift v. Porter*, 8 N. Y. 516.

“No legacies shall be paid by an executor or administrator until after the expiration of one year from the time of granting letters testamentary, or of administration, unless directed by the will to be sooner paid.” Code Civ. Pro., § 2721. It has been settled by the Court of Appeals that since, under said section 2721 of the Code, general legacies are not payable until one year after grant of letters, such a legacy does not begin to draw interest until that time. *Matter of McGowan*, 124 N. Y. 526.

Within one year from granting of letters testamentary, C. B. Miller, one of the executors, offered to pay \$64,564.02 to each of the contestants and to St. Elizabeth's Hospital in full for their respective legacies, which sum they declined as a payment in full, but did accept the sum of \$60,000 on account of their respective legacies. It appears by the account that each of said institutions was tendered more than it will now receive.

I hold and decide that the executors correctly construed the will and that their plan for the distribution of this estate, as set out in the account on file herein, accords with the testator's intent, and that said account is a true and correct account of all proceedings in this estate.

I hold and decide that each of said six institutions is entitled to \$4,259.33, as provided for them in the account on file, in addition to the sum of \$60,000 heretofore paid to each of them, but without interest and subject to its share of the expense of this accounting.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of WILLIAM EDMOND CURTIS, P. HALSTEAD SCUDDER and DAVID STEWART, as Executors of the Last Will and Testament of JOHN ORDEONAU, Deceased.

(Surrogate's Court, Nassau County, August, 1909.)

WILLS—INTERPRETATION AND CONSTRUCTION—TERMS FIXING PLURALITY OR SEVERALTY OF OWNERSHIP OR RIGHT—PARTICULAR WORDS OF DOUBTFUL MEANING—GIFTS TO "HEIRS," ETC.—*PER STIRPES* OR *PER CAPITA*.

Where a testator leaves his residuary estate, one-third thereof to the heirs of his three sisters, adding the words "to be divided among them *per capita* as well as *per stirpes*, equally, and in all respects, share and share alike," a *per capita* division among the heirs of one of the sisters consisting of a daughter and seven children of a deceased daughter was not intended; but the surviving daughter will take one-half of her mother's share and the other half will be divided *per capita* among the children of the deceased daughter.

Proceeding upon the judicial settlement of the accounts of executors.

Payne & Scudder (Edward T. Payne, of counsel), for executors; Foster & Foster (Edgar P. Foster, of counsel), for Mary Molau Marcell; Augustus N. Hand, for Kingman legatees.

JACKSON, S.—The only question upon this accounting arises in respect to the interpretation of the residuary clause of the will. It is contained in "Clause Thirty-eight" of the will, and is as follows:

"All the residue and remainder of my estate of whatever description and wherever situated, excepting my Bed-Room and Library furniture which I hereby donate to Mrs. Deborah I. Simonson, I give and bequeath as follows, to wit:

"One Third of such Residue I give and bequeath to the heirs of my sister Eliza Servatius; One Third of such Residue I give

and bequeath to the heirs of my sister Clara Molau, and One Third to the heirs of my sister Florine J. Bringues, to be divided among them *per capita* as well as *per stirpes*, equally, and in all respects, share and share alike." The residuary estate now amounts to over \$100,000.

Eliza Servatius died prior to the testator and her heirs were a son, Louis A. Servatius, and a daughter, Clara de Salignac. Clara de Salignac died intestate after the testator and the administratrix of her estate is her daughter, Mary C. de Salignac.

The one-third of the residuary estate given to the heirs of Eliza Servatius is, therefore, vested in Louis A. Servatius and Mary C. de Salignac as administratrix of the estate of Clara de Salignac, deceased, in equal shares.

Florine J. Bringues survived the testator and died July 12, 1908, and her sole heir was her daughter, Mrs. Lillie Judik. The one-third of the residuary estate given to the heirs of Florine J. Bringues is, therefore, vested in Mrs. Lillie Judik.

Clara Molau died many years prior to the testator and her heirs at the time of his death were a daughter, Mary Molau Marcell, and the following seven children of her deceased daughter, Clara Molau Kingman, to wit:

William L. Kingman, Charles Molau Kingman, Le Roy Kingman, Henry E. Kingman, Oliver Kingman, Wyatt Kingman and Miriam Kingman.

The limits prescribed by the testator himself in his will for the devolution of this property are, one-third "to the heirs of my sister Eliza Servatius," one-third "to the heirs of my sister Clara Molau," one-third "to the heirs of my sister" Florine J. Bringues.

There is no question as to the disposition of the two-thirds of the residue given in the will to the heirs of Eliza Servatius and the heirs of Florine J. Bringues. The difficulty arises over the division of the residuary third given to the heirs of Clara Molau.

Let us first consider how this residue would pass under the statute and the decisions if the testator had not added the phrase, "to be divided," etc. A bequest to heirs without any qualifying words, such as "equally," "per capita" or "*per stirpes*," or "share and share alike," is merely an indication of an intent that the statute which defines who the heirs are should be followed. Under the statute, when we have persons of unequal degrees of kinship to the decedent, they take *per stirpes*. In the event supposed, Mrs. Marcell would have one-sixth of the residue and each of the Kingman children one-forty-second.

If the balance of the sentence is so contradictory as to be meaningless, it must be disregarded; and then the statute will so divide this one-third of the residue.

If any deviation was intended to be made by the testator from the order which the statute fixes, we must find it in the words of the will, viewed in the light of the circumstances surrounding the testator.

What was his intent? What did he have in mind when he penned the residuary clause?

He was a very eminent lawyer, and certainly knew the meaning of the words *per capita* and *per stirpes*, which he used in this residuary clause.

He had by very clear and explicit language disposed of a large part of his large estate, about \$260,000, in the preceding paragraphs, when he added the residuary clause.

With a large estate and having made many specific bequests, he probably had in mind the fluctuations that periodically occur in the values of estates and property of all kinds. With this in mind, he had not specifically disposed of all his estate; and in directing the disposition of the residue, of uncertain value, he undoubtedly intended to indicate to whom it should go in any possible event, so that he should die intestate as to none of it.

It is probably for this reason that he wrote that one-third

should go to the heirs " of my sister Eliza Servatius, one-third " to the heirs " of my sister Clara Molau, and one-third " to the heirs " of my sister Florine J. Bringues.

The word " heirs " had a certain meaning.

Unless the families of these three sisters ceased to exist, there would still be heirs to take the residuary estate. And if the three families became extinct, still there would be heirs whom the statute would point out.

It will be noted, also, that Mrs. Bringues was still alive when the will was written and even survived the testator, and also that the *sisters'* heirs, and not *his* heirs, were named in this clause.

It seems probable, therefore, that the testator intended at least to provide against a partial intestacy.

It is not open to question, either, that, within the three branches of the family represented by his sisters, he intended his residuary estate to remain.

The question at issue is: In what proportion did he intend to divide this residue? He gives one-third to each of the three branches represented by each of the three sisters, or her heirs. So far, his intent is plainly expressed. But then he adds, " to be divided among them *per capita*, as well as *per stirpes*, equally, and in all respects, share and share alike."

How can this direction be followed explicitly, in making distribution among the heirs of Clara Molau? She left one daughter, Mrs. Marcell, and also seven grandchildren, the children of a deceased daughter, Clara Molau Kingman.

This situation may or may not have been known to the testator.

It appears only that his sister Clara Molau had died many years before the testator, and that only Mrs. Marcell and Miriam Kingman are given legacies in the will.

If the testator had directed this one-third of the residue of the estate to be divided among Clara Molau's heirs *per capita*,

or had directed the division *per stirpes*, there could be no question remaining. But he directs the division to be "among them *per capita*, as well as *per stirpes*, equally and in all respects, share and share alike."

The Kingman grandchildren contend that this residuary clause of the will plainly requires a *per capita* division among the heirs of Clara Molau.

I think not.

The testator had plainly indicated a division of the residuary estate into three equal parts, one to go to each of the three designated branches of the family.

This was a *per stirpes* division, for Mrs. Bringues survived the testator, and both when the will was written and at the time of his death she had only one heir, Mrs. Judik. The testator must have been fully acquainted with this branch of the family, for elsewhere in the will he makes provision for both Mrs. Bringues and Mrs. Judik.

There was no need of adding a direction for either a *per stirpes* or a *per capita* division, when he divided the residuary estate into thirds.

The testator had already sufficiently indicated the division. It must be that, when he directed how the thirds should be subdivided, he intended to apply to the subdivision the words under examination.

If we attempt to apply them to the primary division into thirds, we at once extend the difficulty to that division; and the testator's language is so plain and his scheme and his meaning so apparent, that none of the parties urges such an extension.

In their argument the Kingman legatees suggest that the words "as well as *per stirpes*" evidently refer to something which has gone before; that the division of the residuary estate into equal thirds allotted to the heirs of the three sisters is a *per stirpes* division, and is evidently what the testator referred to; that the words should be regarded as referring to the primary

division only, and should not be held to outweigh the direction three times reiterated in the words "*per capita*," "equally," and "share and share alike." But, apparently and grammatically, "as well as *per stirpes*," modifies "divided."

If the testator had intended a *per capita* division, would he not have said so? The words "*per capita* and not *per stirpes*" we may assume were familiar to him; and, if he intended what they mean, would he not have used them? The mere fact that he did not, indicates that he had something else in mind when he used the words in question.

Limiting the application of the words in question to the subdivision of each third, how can there be a division of the third of the residuary estate given to the heirs of Clara Molau, both *per capita* and *per stirpes*? Only by first dividing the third *per stirpes* between Mrs. Marcell and the heirs of Mrs. Kingman, and then subdividing one-sixth among the Kingman children *per capita*.

This allots to Mrs. Marcell one-sixth of the residuary estate, and to each of the Kingmans one forty-second thereof. This is also the division which the law now prescribes in case of intestacy. Nor do I find anywhere in the will anything which shows a different intention.

It seems to me that this is the only solution which will give meaning to all the words used; and, if we disregard entirely the phrase which causes this confusion as contradictory and meaningless, the law works the same result.

The decree should provide for distribution of the residuary estate as follows: One-sixth to Mrs. Marcell and one forty-second thereof to each of the Kingman legatees.

Decreed accordingly.

Matter of the Final Judicial Settlement of the Estate of
ANTHONY LYDEN, Deceased.

(Surrogate's Court, Sullivan County, September, 1909.)

**EVIDENCE—PAROL EVIDENCE—THE GENERAL RULE AND ITS APPLICATIONS—
ADMISSIBILITY OF PAROL EVIDENCE TO VARY OR CONTRADICT WRITTEN IN-
STRUMENTS IN GENERAL—GENERAL RULE—LEGIBILITY.**

Where there is no illegibility about the word "ten" in a legacy of "ten hundred dollars," parol evidence is inadmissible to change the word "ten" to "two;" although the executors who were present when the will was executed are prepared to testify positively that the scrivener was told to make the legacy two hundred dollars and claim that the word is illegibly written.

Proceeding upon the final judicial settlement of the account of executors.

George H. Smith, for executors; Carpenter & Rosch, for Martin Lyden; George L. Cooke, for Michael Lyden.

ROOSA, S.—On the 13th day of May, 1907, the will of Anthony Lyden, deceased, was duly admitted to probate by the surrogate of the county of Sullivan.

On the 4th day of January, 1909, a petition was filed in the Surrogate's Court by Martin Lyden, one of the beneficiaries under the will, praying that a citation issue directing the executors of said estate to appear and render a final account of their proceedings as such executors.

On the 8th day of January, 1909, the executors filed a petition for a final judicial settlement of their accounts and subsequently filed their account as such executors.

This contest arises upon the final settlement of said account and the executors ask for a construction by the surrogate of the amount of a certain legacy named in the will to the petitioner

herein, Martin Lyden. The contention of the executors is that a certain word in the will of Anthony Lyden, deceased, is not legibly written and they are not able to determine from the will whether the legacy thereunder is \$200 or \$1,000.

The legatee claims the word is ten while the executors and the residuary legatee, Michael Lyden, insist that it is two.

The law is practically settled that the meaning of the will must be ascertained from the will itself and, when the language is not uncertain or doubtful, parol evidence is not permissible to contradict it. It is contended on the part of the executors that they were both present when the will was drawn and heard the deceased state to the scrivener to give Martin Lyden \$200. This evidence was objected to on the ground that there is no uncertainty or ambiguity in the will and, therefore, parol evidence cannot be admitted to explain or contradict the wording of the will. The counsel for the executors and the residuary legatee do not claim there is any ambiguity in the will; on the contrary, in their brief they state "there is no ambiguity in the provision."

Chancellor Kent in *Mann v. Mann*, 1 Johns. Ch. 231, says: "The objection to supply the imperfection of a written will, by the testimony of witnesses is founded on the soundest principles of law and policy, and if collateral averments be admitted, * * * to use the words of Sir Matthew Hale, 'how can there be any certainty? A will may be anything, everything, nothing.'"

"The statute appointed the will to be in writing, to make it a certainty; and shall we admit collateral averments and proofs, and make it uncertain?"

In 3 Peere Williams, 354, this language was used: "That if we admit parol proof, then the witnesses, and not the testator, would make the will." In the *Mann* case the court further says: "The only apology for parol proof, in any case, is the necessity of the thing, because the ambiguity is so complete as

to elude all interpretation and would destroy the devise altogether unless explained."

It is a well settled rule which runs through all the books that parol evidence cannot be admitted to supply or contradict, enlarge or vary the words of a will, or to explain the intention of a testator, except in two cases: 1, Where there is a latent ambiguity, arising dehors the will as to a person or subject meant to be described; and, 2, To rebut a resulting trust. It is conceded by counsel that this case does not come within either exception.

Jarman on Wills (384) says: "It is clear that parol evidence of the actual intention of a testator is inadmissible for the purpose of controlling the construction of the written will, the language of which must be interpreted according to its proper acceptation, or with as near an approach to that acceptation as the context of the instrument will admit."

Robert's Treatise on Wills (267) says: "There is no rule which stands on a surer principle than this: that parol evidence is never to be admitted where there is no ambiguity to call for explanation and where the will may operate according to the words without any foreign help."

In *Kerr v. Bryan*, 32 Hun, 53, the court said: "Testimony was offered and excluded as to a conversation between the testator and his counsel who drew the will, to the effect that his intention was to limit Mrs. Kerr's interest in the property to a life estate. This evidence was not admissible. The intention of the testator must be ascertained from the language of the will, and when such language has a plain meaning, and is neither uncertain, and ambiguous nor doubtful, parol evidence to contradict it, to explain it, is inadmissible."

In *William v. Freeman*, 83 N. Y. 569, the court said: "The declarations of a testator can never be resorted to for the purpose of contradicting, or even explaining, the intentions expressed in the will * * * ." The intent of a testator ex-

pressed in his will cannot be changed by his parol declarations *dehors* the will.

The general rule is that declarations of a testator, before, contemporaneously with, or after, the making of a will, are inadmissible to affect construction. 1 Redf. Wills, 538.

The court in *Matter of Keleman*, 126 N. Y. 78, said: "It is a cardinal principle in the construction of the terms of a will that the intention of the testator must be gathered from the will itself, parol proof being only permissible to show the condition of the estate and the surroundings of the testator; and that conversations as to the intentions, or even written memoranda, cannot be resorted to for the purpose of sustaining a will which is apparently against the provisions of a statute, much less to destroy a will which upon its face is not in contravention of any statute."

In *Brown v. Quintard*, 177 N. Y. 83, the court said: "Extraneous and parol evidence is admissible to explain a will when there is a latent ambiguity, arising *dehors* the instrument, but never to supply, contradict, enlarge or vary the written words."

In the recent case of *Tousey v. Hastings*, 194 N. Y. 80, the court uses this language: "Aside from the danger of fabrication, verbal admissions are regarded as unreliable evidence, because experience shows that they are frequently misunderstood, imperfectly remembered and inadvertently made." How much is inference and how much recollection neither we nor the witnesses can tell. The opportunity for misunderstanding and misrecollecting what the decedent said is quite apparent from the evidence, and as the highest Federal court once decided "courts of justice lend a very unwilling ear to statements of what dead men had said." 21 How. N. S. 493.

When the will of Anthony Lyden was admitted to probate and recorded in the Sullivan county surrogate's office, no objection was filed and no question raised as to the amount of any

legacy contained in it; and the record shows that in the legacy to Martin Lyden it was recorded "ten hundred dollars." On this hearing for a final settlement before the surrogate, the witnesses, without an exception, were asked to read the provision in reference to Martin Lyden, and they read it "ten" and not "two." The witness McGrath, sworn for the executors, testified that had he not heard of the dispute he would call it "ten."

This testimony all goes to show that there is no illegibility about the word. The scrivener was a poor writer as well as a poor speller; but, on all the testimony and a careful examination of the will, it is clear there is nothing to warrant the court in holding that parol proof should be admitted.

Admitting, for the sake of the argument, that the executors, who were present when the will was drawn, are prepared to testify positively that the scrivener was told to make the legacy Martin Lyden two hundred dollars, it cannot be allowed, as parol evidence of this character, under the authorities in this State, cannot be admissible.

As has been said by a legal writer: "It will readily be admitted that to serve the particular purpose, or meet the supposed hardship of an individual case, we ought not to break in upon the established principles of the law.

The observation of Lord Talbot contains the true and wise doctrine on this subject, that "it is better to suffer a particular mischief than a general inconvenience."

I, therefore, feel bound, under all the evidence in the case and a careful examination of the will, to construe the will as awarding Martin Lyden the sum of ten hundred dollars.

Let a decree be accordingly prepared.

Decreed accordingly.

**In the Matter of the Judicial Settlement of the Account of
JESSE STILES as Executor of the Last Will and Testament
of LORING F. FREEMAN, Deceased.**

(Surrogate's Court, Saratoga County, October, 1909.)

EXECUTORS AND ADMINISTRATORS: ARTICLES SET APART AND SUSTENANCE FOR SURVIVOR AND CHILDREN—SUSTENANCE; MONEY FOR SUPPORT OF FAMILY: DEBTS AND LIABILITIES OF THE ESTATE—EXHIBITION, ESTABLISHMENT, ALLOWANCE AND ENFORCEMENT OF CLAIMS—EVIDENCE—CLAIMS BY RELATIVES AND PERSONS IN CONFIDENTIAL RELATIONS; SERVICES TO DECEDENT.

INSANE PERSONS—PROPERTY AND LIABILITIES OF INCOMPETENTS—LIABILITY OF ESTATE FOR DEBTS AND CLAIMS.

WILLS—INTERPRETATION AND CONSTRUCTION—EXPENSES OF THE ESTATE, CHARGES, ADVANCES AND PAYMENT OF DEBTS AND LEGACIES—RULES AND IMPLICATIONS—IMPLIED CHARGES ON LAND—DEFICIENCY OF PERSONALTY.

Where a claim is made by a married woman against the estate of her sister's deceased husband for the board of her sister during the incompetency of the decedent, and it appears that the board was furnished the sister under the latter's agreement to pay therefor, the claim should be allowed; but an additional claim for the care of the sister at another time where there was no agreement to pay therefor and under circumstances indicating that the services were intended at the time to be gratuitously performed should be disallowed.

The husband of another sister who presents a claim for the board of decedent's wife, being related to her only by affinity, is not to be presumed to have intended to furnish her board gratuitously; and, where it appears he had been paid for her board on a previous occasion, his claim should be allowed.

Where a decedent was not possessed of fuel and provisions at the time of his death, an allowance in money cannot be made to his widow therefor under subdivision 3 of section 2713 of the Code of Civil Procedure.

Where a decedent leaves real property in which his widow has dower, she is entitled to forty days' sustenance, under section 204 of the Real Property Law, which, in the absence of other proof as to its value, may be allowed to her at the rate paid for her board during his lifetime.

Where a testator in the first clause of his will gave to his wife the homestead which stood in the names of both as tenants by the entirety,

and the household furniture most of which would have been set off to her as exempt, and, in the second clause of his will, gave two pecuniary legacies "out of the rest, residue and remainder of my property," and, in the third clause of his will, gave his remaining cash and personal property to his wife, and, in the fourth clause of his will, devised certain specific real property to his executor, in trust, to pay the net income to his wife for life and, at her death, to convert the same and distribute it to his heirs; and where, although it does not appear how much personal estate the testator had when he made his will, it appears that less than two years thereafter, when he was adjudged a lunatic, he had enough money to pay the legacies, an intention to charge the legacies upon the specific real property left in trust for his wife will not be inferred.

Proceeding upon the judicial settlement of the account of an executor.

C. S. & C. C. Lester for executor; Jenkins, Kellogg & Barker for Mary Freeman McGowan; John H. Barker, special guardian for Hazel McGowan; Salisbury & Rowe, for Martha Freeman and Emeline Ross.

OSTRANDER, S.—This is a proceeding for the judicial settlement of the accounts of Jesse Stiles as executor of the last will and testament of Loring F. Freeman, deceased. Upon this accounting, claims of Emeline Ross and John B. Snyder against the estate have been, by stipulation, referred for determination to the surrogate and will be first considered.

Emeline Ross claims \$151; \$100 for board of Mrs. Freeman from April 4, 1907, to August 27, 1907; \$51 for care of Mrs. Freeman from August 18, 1904, to September 15, 1906.

As to the claim for board. Mrs. Ross was a sister of Mrs. Freeman, the wife of testator; and it is claimed by the executor and by counsel for Mary McGowan and by the guardian for Hazel McGowan that there was no implied contract to pay board because of the near relation of the parties and, moreover, that the circumstances shown rebutted any claim of intention

to pay for such board. She came to Mrs. Ross' house from Snyder's, April 4, 1907, and remained until August 27, 1907. But she testified that she agreed to pay Mrs. Ross five dollars per week for her board. Mr. Freeman was incompetent and, as no provision was made for her board, I think it was a necessity for which she could bind her husband. The strict language of her testimony, viz: "Q. What agreement, if any, was there between you and Mrs. Ross with reference to your boarding with her? I refer to the amount you were to pay her for your board. A. Agreed to pay her five dollars. Q. Five dollars a week? A. Yes." might, under some circumstances, fail to indicate any intent to charge the husband's estate; but, as Mrs. Freeman had no means of her own and was unable to do any work of any importance, I think we must infer that the board was intended to be furnished upon the credit of the husband who had some means. From April 4, 1907, to August 18, 1907, the death of testator, was nineteen and one-half weeks, which, at five dollars per week, amounts to ninety-seven dollars and fifty cents for which Mrs. Ross should have a recovery.

The services, upon which the remaining claim of Mrs. Ross for fifty-one dollars for care of Mrs. Freeman between August 18, 1904, and September 15, 1906, is founded, were not rendered upon any express agreement to pay for them. And, if any agreement to pay could be implied, in view of the relationship of the parties, yet it is evident from the testimony of Mrs. Ross that they were rendered without any intention to charge for them. She says "Q. You didn't expect to render any bill? A. I didn't expect to at the time. Q. You performed those services because Mrs. Freeman was your sister? A. Because I had to. Q. Why did you have to? A. Because there wasn't any one else to do it or any one that could do it as well as I could. Q. You performed them for your sister? A. I did. Q. When she sent for you? A. Yes."

This testimony, in connection with the fact that no claim for

such services was ever rendered during the lifetime of the deceased, satisfies me that the services were intended to be gratuitously performed; and this part of the claim of Mrs Ross is disallowed.

John B. Snyder presents a claim for forty-one dollars for board of Mrs. Freeman between February 7, 1907, and April 3, 1907. Mrs. Snyder was Mrs. Freeman's sister. The claim was first presented as Mrs. Snyder's, but this was probably due to a misapprehension as to who was by law entitled to the claim. The relationship between Mr. Snyder, who in fact furnished the board, was only by affinity; and, under the doctrine of *Gallagher v. Vought*, 8 Hun, 87, was not of itself sufficient to repel an implication of agreement to pay for the board. There was no express contract. The question remains, was the board furnished with intent to charge for it? The court had ordered the committee to pay Snyder for Mrs. Freeman's board up to about February 8, 1907, and the committee had done so. This seems to negative any intention to furnish her with board gratuitously; and, as there is no dispute about the value of it, the claim should be allowed.

On behalf of the widow it is claimed that no exemption has been set off to her and that an allowance should be made to her upon this accounting for \$150 under subdivision 5 of section 2713 of the Code, and for sixty days' fuel and provisions under subdivision 3 of said section. She is undoubtedly entitled to an allowance of \$150 under subdivision 5, subject to a deduction of fifty dollars which appears to have been paid to her by the executor and which, although not specifically applied to said allowance, appears by general consent to be applicable thereto.

As to the allowance for fuel and provisions, there were no such articles in existence at Freeman's death. It has been held in the Second Department that in such case the widow may have a money allowance in lieu of the fuel and provisions speci-

fied. *Matter of Williams*, 31 App. Div. 617; *Matter of Hem-bury*, 37 Misc. Rep. 454; *Matter of Hulse*, 41 id. 307; *Matter of Berns*, 52 id. 426.

But the reasons for such holding are not satisfactory, and to follow this rule would work endless confusion, and the application of it would lead to as many diverse rulings, as to the relief to be granted, as different surrogates might think fit, instead of the certainty evidently intended in the statute. I concur with the reasoning of the opinions in *Matter of Libolt*, 102 App. Div. 29; *Matter of Griffith*, 49 Misc. Rep. 405; *Matter of Keough*, 42 id. 387; *Matter of Sprague*, 41 id. 608; *Matter of Perry*, 38 id. 167; *Matter of Campbell*, 48 id. 278; *Matter of Baird*, 126 App. Div. 39; and I do not think the surrogate has any jurisdiction to make a money allowance in place of fuel and provisions which were not owned by the testator at the time of his decease. But the decedent left realty in which the widow had a dower right, and she seems to be entitled to forty days' sustenance under the provisions of section 204 of the Real Property Law.

From the testimony in the case it seems that she had been receiving board and care before his death, for five dollars per week; and, while there is no other specific evidence as to the value of her sustenance, I think that sum would not be an unreasonable allowance; and I therefore allow the widow for such sustenance thirty dollars.

The will bears date October 16, 1903, and Freeman died August 18, 1907. The house in which he resided at Gansevoort was held by a deed standing in the joint names of himself and his wife and is conceded to have been an estate by the entirety which went by operation of law to his widow, or his descendants, although it is attempted to be devised by the first clause of his will. After making the will he became incompetent, and a committee of his person and estate was appointed. At the time of his death his committee had a balance of cash

in his hands amounting to \$266.48, which has come to the executor, and the executor has also received the proceeds of certain old iron which was sold for \$5.40.

The deceased also held title to a house and lot on Geyser avenue, in or near the village of Saratoga Springs, which had been leased in 1901 to one Tolmie; and, in April, 1903, there had been a further lease of said property to said Tolmie. The lease reserved rent at \$48 per month prior to May 1, 1907, and \$50 per month thereafter. There is no testimony which shows how much, if any, rent was due at Freeman's death; but payments of rent were made to the executor by Tolmie to the amount of \$295, down to the 4th day of November, 1907. At that time, by the terms of the lease, only \$150 had fallen due since the death of Freeman. There is no claim that any advance payments of rent had been made by Tolmie; and I think that, in the absence of further evidence, the presumption must be that the amount thus over-paid was for application for rent accrued at the death of Freeman; thus making personalty of that part of the rent accrued at Freeman's death, namely, \$145, and making the whole personalty which has come to the executor's hands as above stated \$416.88.

The executor collected of rent upon the Geyser avenue property down to the time of the filing of the account \$400, and has since collected \$25. Deducting from this the sum of \$145, which I have concluded accrued prior to Freeman's death, leaves a balance of \$280.

At the time of Freeman's death the Geyser avenue property was subject to a mortgage for \$1,500 and interest thereon at six per cent. from March 1, 1907. The executor paid interest on this mortgage, August 28, 1907, \$45; March 2, 1908, \$45. Before the next installment of interest fell due the house on the property burned. On June 17, 1908, the executor received for insurance \$2,200; and, on the same day, he paid the mortgage and balance of accrued interest, \$1,533.25. He has also

paid for taxes upon the property \$4 on January 21, 1908; \$28.01 on February 2, 1908.

The questions raised as to the disposition to be made of the funds and real estate remaining lead to the construction of the second clause of the will and require a determination as to whether the legacies to Mary Freeman McGowan and Hazel McGowan, made in said second clause, are charged upon the Geyser avenue property, being the only real estate of the testator.

By the first clause of his will, Freeman directed payment of his debts and gave his residence in Gansevoort, with the household furniture therein, to his wife. This residence was held by Freeman and his wife as an estate by the entirety, and his will had no operation upon it, the property passing by operation of law to the widow. The property contained in it was of little value; and it would, no doubt, all or mostly, have passed to the widow as exemptions under the Code in addition to what has been herein allowed her.

The second clause of the will reads: "Second. Out of the rest, residue and remainder of my property, I give to be next paid five hundred dollars (\$500.00) to each Mary Freeman McGowan, wife of Andrew McGowan, and five hundred dollars (\$500.00) to Hazel McGowan, daughter of the said Andrew McGowan and Mary McGowan."

The third and fourth clauses are in the following language:

"Third. Should there be any cash or other personal property belonging to me, which is not heretofore disposed of after paying all debts, remain in bank or otherwise, I give the said cash and personal property to my wife above named.

"Fourth. I give my property known as the Geyser Avenue property, now occupied by John Tolmie, to my Executor hereinafter named in trust for the following uses and purposes, viz.:

"a. To pay the net income thereof to my wife, Martha Ellison Freeman, during her natural life.

"b. Upon the death of my said wife, I direct my executor hereinafter named, to, as soon as practicable and for the best interests of my estate, to convert all property remaining in his hands into cash and distribute the same among my lawful heirs the same as if I had died intestate."

It is a well settled rule of law that legacies of money are to be paid from personal property; and, if the personal estate is insufficient therefor, the legacies abate unless the real estate is charged with their payment. It is equally well settled that whether a legacy is charged on the real estate devised in a will is a question of intention upon the part of the testator. That intention may be ascertained, either by express words in the will, or by such a conclusion flowing from all the provisions of the will. And it has been held that extraneous circumstances may be considered in aid of the terms of the will. *Hoyt v. Hoyt*, 85 N. Y. 142. The court is not to make a will for the testator, but to ascertain, from all the provisions and extraneous circumstances in aid thereof, what the testator intended, not what the court may conceive he should have done under the circumstances, but what he did, in fact, intend to do.

There is no language in this will expressly charging the McGowan legacies upon the realty; and there would be no difficulty in construing it, were it not for the following language used in the second clause, "out of the rest, residue and remainder of my property I give to be next paid" etc., the money legacies to the McGowans. It is claimed that these words indicate an intention to create all the testator's property remaining after satisfying the first clause a fund for the payment of the McGowan legacies. Putting ourselves in the testator's place at the making of the will: The Geyser avenue property was rented for \$48 per month and was subject to an interest charge of about \$7.50 per month, besides the taxes, insurance and repairs. The testimony does not disclose how much personalty he had at the time of making his will, in October, 1903; but,

early in the year 1905, when his committee made inventory of his estate, he had \$1,014.46 in bank. It does not appear that he had any debts at that time. Freeman and his wife were, so far as appears, living happily together and had no children. She had no income-bearing property, and no reason is disclosed why he would be likely to desire to leave her unprovided for. By the third clause of the will he gives all his cash and other personal property not previously disposed of to his wife. This would seem to indicate some intention that the legacies before mentioned were to be paid out of the personal estate. It is not very clear or convincing, standing by itself; but it may have significance in connection with the other facts in the case.

The fourth clause is absolute in its terms, devising the Geyser avenue property. It is not made in terms subject to any other part of the will, is not in terms a devise of any residuum, but is on its face an absolute devise of specific property, in trust, to pay the income for life to his wife and later to convert it into cash and distribute to his heirs. The effect of the whole instrument, if the intent was not to charge the realty with the McGowan legacies, was to leave the widow with an income, about sufficient, in connection with the residence, to give her a modest support. But, if the intent was to charge the McGowan legacies on the realty, then the effect would be to leave the widow, possibly, without any income.

While the matter is not entirely free from doubt, I think the testator deemed his personalty sufficient to pay the McGowan legacies, and intended to preserve the Geyser avenue property as a means of support for his wife, and did not intend to charge it with payment of the legacies. The insurance moneys, received for fire losses on the Geyser avenue property, stand in place of the realty destroyed and are to be treated as so much realty in the hands of the trustee as principal of the trust fund, but subject to such demands for payment of debts and funeral

expenses, if any, as may be just. Under section 250 of the Real Property Law, it is the duty of the devisee, that is, the trustee, to pay the mortgage debt. As between the beneficiaries under the trust, the life beneficiary, the widow, should pay the interest accruing subsequently to Freeman's death, and the remaindermen the principal and interest accrued upon the mortgage up to Freeman's death. The life beneficiary should pay the taxes. *Cromwell v. Kirk*, 1 Dem. 599. The rents received, accruing since Freeman's death, amounting to \$280, belong to the trustee as income, for the benefit of the widow and not for the remaindermen, and do not constitute a fund for payment of debts and funeral expenses. *Pelletreau v. Smith*, 30 Barb. 494; *Matter of Franklin*, 26 Misc. Rep. 107; *Kohler v. Knapp*, 1 Bradf. 241; *Haven v. Haven*, 1 Redf. 374.

Distribution should be made in accordance with the foregoing views, along the following lines:

From the \$416.88 personalty received by the executor should be first paid the widow's exemptions and quarantine, \$180. From the balance remaining, the administration expenses should be paid. From the balance remaining, together with the insurance moneys received, less the mortgage debt and accrued interest thereon up to Freeman's death (\$1,542), should be paid the debts and funeral expenses, executor's commissions and the expenses of this accounting; and the balance should be turned over to the trustee as principal of the trust fund. The rents accruing since the death of Freeman (\$280) should pay the interest accruing upon the mortgage after Freeman's death, the taxes, and the trustee's commissions upon those rents, and the balance should be paid to the widow.

Decreed accordingly.

Matter of the Estate of ALEXANDER EYCHNER, Deceased.

(*Surrogate's Court, Oneida County, November, 1909.*)

EXECUTORS AND ADMINISTRATORS—SUBJECTION OF REALTY TO PAYMENT OF DEBTS AND LIABILITIES OF ESTATE—PROCEEDINGS TO SUBJECT REALTY—TIME FOR APPLICATION FOR SALE—LAPSE OF TIME BEFORE LETTERS.

Lapse of time prior to the granting of letters upon the estate of a deceased person does not impair the right of one having a claim for funeral expenses to institute a proceeding for the sale of the decedent's real property for the payment thereof at any time within three years after letters are granted, nor the right of those having judgment liens upon such real property at the time of the decedent's death to participate in the proceeds of the sale of such property.

Proceeding for the sale of decedent's real estate for the payment of debts and funeral expenses.

O. P. Backus, for John R. Jones; Frank S. Baker, for Roscoe Eychner, administrator; J. P. Gubbins, for Roy Smith, Goodey Smith, Walter Smith, Marion Smith, Winfield Smith, minors.

SEXTON, S.—Alexander Eychner died October 4, 1892, intestate, leaving real estate, but no personal property. His son, Roscoe Eychner, October 7, 1892, paid the funeral bill of \$59, and, on December 22, 1908, was appointed administrator of this estate. On December 30, 1908, said administrator petitioned this court for a decree directing the sale of the decedent's property for the payment of his debts and funeral expenses. The petition shows that the claims of three judgment creditors of the deceased, amounting to \$1,160.05, were rejected by the administrator on the ground that they were barred by the Statute of Limitations. On the return of the citation, John R. Jones, a judgment creditor, by assignment, in the amount of \$514.69, filed an answer, alleging that the claim of the admin-

istrator for \$59 for funeral expenses was barred by the Statute of Limitations, and that his judgments by assignment were valid liens upon the real estate for \$514.69, and should be first paid. Jones' claims were presented to and rejected by the administrator, but that fact does not deprive the surrogate of jurisdiction to determine the validity of the same in a proceeding to sell real estate to pay debts. *Merchant v. Merchant*, 25 N. Y. St. Rep. 268; *Matter of Application of Haxtun*, 102 N. Y. 157.

It is contended on behalf of creditors that the administrator cannot maintain this proceeding to pay his own bill for burying deceased, because it did not accrue within the six years preceding this application but did accrue in the year 1893, and is barred by the Statute of Limitations.

In *Davis v. Garr*, 6 N. Y. 124, the rule is laid down, "that where the statute did not begin to run in the lifetime of the testator, it could not commence running until there was a personal representative, against whom a suit could be brought."

This estate had no representative until December 30, 1908. Section 2750 of the Code of Civil Procedure provides for the maintenance of this proceeding, for the payment of the debts and funeral expenses of the deceased, "at any time within three years after letters were first duly granted within the State, upon the estate of the deceased." The claim that this proceeding is not maintainable by the administrator to sell the real estate to pay his funeral bill is therefore untenable in law.

One point remains. The administrator rejected the claims of all judgment creditors on the ground that the judgments were recovered prior to October 4, 1892, and are barred by the Statute of Limitations. Section 2749 of the Code provides, that "Real property of which a decedent dies seized, * * * may be disposed of, for the payment of * * * judgment liens existing thereon at his death," etc. Section 2750 of the Code provides, that "At any time within three years after let-

ters were first duly granted within the State * * * any other creditor of the decedent * * * may present to the surrogate's court, * * * a written petition," etc., praying for the sale of sufficient real estate of decedent to pay his debts. Section 2749 of the Code authorizes the sale to pay judgment liens; and section 2750 of the Code prescribes the procedure for a judgment creditor and gives him three years after the appointment of an executor or administrator in which to start the proceeding. An administrator in this estate was appointed December 22, 1908, at which time the three years' limitation began to run and had not expired prior to the bringing of this proceeding. Hence it follows that this proceeding is maintainable and that the judgments owned by John R. Jones and the judgment of Elizabeth Owens in the amounts proved on the hearing are now valid liens upon the real estate described in the petition and entitled to be paid in full, with interest, in the order of their priority next after the claim of the administrator for funeral expenses and the expense of administration, and the costs and disbursements of this proceeding, which last amount will be fixed upon the presentation of the decree of sale.

Decreed accordingly.

Matter of the Estate of S. NELSON JONES, Deceased.

(Surrogate's Court, Yates County, November, 1909.)

TAXES—INHERITANCE AND TRANSFER TAXES—PROPERTY AND INTEREST SUBJECT TO TAX—TRANSFER BEFORE DEATH.

Where the owner of several large farms executed deeds of them to his son, but the deeds remained unrecorded and in the possession of the grantor until his death, the insurance on the buildings continued to be payable to the grantor who made contracts in his own name with tenants to work the farms, except the home farm on which his son lived; all the farms continued to be assessed to the grantor who paid the taxes, the crops were principally marketed at the grantor's ware-

house and the accounts thereof were kept in his books as though he owned them, and all transactions with tenants, including settlements with them, were had by the grantor, it will be inferred that it was the intention of the grantor that the deeds should not become effective until his death, and the transfer is, therefore, taxable.

Appeal from an order assessing a transfer tax.

Charles W. Kimball and Calvin J. Huson, for Herbert Jones, administrator and individually, appellant; John T. Knox and Henry J. Sadler, for Comptroller, respondent.

BAKER, S.—The grounds of this appeal are:

First. That the value of the estate as fixed by the order assessing the transfer tax is excessive and not warranted by the proof taken by the appraiser.

Second. That several large farms, upon the transfer of which a tax was assessed in said order, were, in fact, conveyed by the decedent to his son and members of his son's family some five years previous to his death by deeds which transferred an absolute title, and that such transfer was not made in contemplation of the death of the grantor, nor intended to take effect in possession or enjoyment at or after such death, and is not taxable.

Herbert A. Jones, the son and administrator, is the only heir of the decedent, he and his father living in the same township, but on separate farms.

There is no evidence which would justify a conclusion that a transfer was made in contemplation of death.

The undisputed evidence produced before the appraiser is that, after these deeds were executed, they remained unrecorded and in the possession of the grantor until his death; that the insurance carried on the buildings continued to be payable to the grantor; that he made contracts with the tenants to work the farms, excepting the home farm, on shares, describing him-

self in such contracts as "the party of the first part" and signing "S. Nelson Jones;" that the son continued to reside on the home farm and "worked it," the grantor continuing to live on the farm known as the Seamans farm; that all the farms continued to be assessed to the grantor, who paid the taxes; that the crops were mostly marketed at grantor's warehouse at Himrod, and the accounts thereof kept in grantor's books, practically as though he owned them; that the transactions with the tenants were had by the grantor and all settlements made with him.

The son testified that he "superintended the whole thing *for his father* practically the same as though he had taken full possession;" that he had all the avails of the farms since the date of the deeds, and that he had access to the desk in which the deeds were kept and, some of the time, had the keys to the desk.

The testimony of Herbert A. Jones is mostly incompetent evidence and would not have been received upon a hearing where some attention was given to the rules of evidence, and it should be carefully scrutinized. It is not supported by the acts of his father, nor the history of the farms subsequent to the date of the deeds, nor by the circumstances of the case.

The home farm of 280 acres, on which the son resided and worked, and which he testified he leased to a tenant one year, making the lease in his own name, was not conveyed to him; but the deed names his wife, children and heirs as the grantees of this farm.

The fair inference to be taken from the testimony is that the grantees were not in possession or enjoyment of the farms described in the deeds, nor was it intended by the grantor that they should be until his death.

The deeds are absolute upon their face as to the title and immediate right of possession and enjoyment, and it is contended by the appellant that the intent as to the possession and beneficial enjoyment must be ascertained solely from the language of

the deeds, and that the surrounding circumstances and extrinsic facts are immaterial.

I do not believe that the courts of our State have adopted such a rule for cases like this. That rule would be a tempting instrument in the hands of persons disposed to avoid the burden imposed by the Transfer Tax Law. It is unfortunately true that many of our citizens are disposed to look on a breach of our tax laws as a matter of thrift and to believe that they may violate such laws without being conscious of moral turpitude. The application of such a rule would permit persons so disposed to execute conveyances of their property, retain possession of the property and conveyances after a technical delivery of the deeds; and, at the death of the grantor, the grantee could maintain that, because the deeds so recited, the transfer was intended to take effect in possession and enjoyment at the date of the deeds, and was not taxable.

I find no authority for such a rule.

The courts in determining the intention look not only to the language of the deed, but to the relations existing between the parties and the *fact* of the beneficial enjoyment. *Matter of Masury*, 28 App. Div. 580.

The evidence produced before the appraiser is of sufficient force to bring the transfer within the statute, and proves a transfer, either by deeds or intestate laws, which is taxable.

Having concluded that the transfer of the farms is taxable, even though they may have been transferred by the deeds in question, it is not necessary to consider whether the transaction with his father, as testified to by Herbert A. Jones, constituted a delivery of the deeds, or of any of them, except for the purpose of determining who shall pay the tax.

Counsel for the appellant, however, in his argument, stated that no question would be raised as to whom the tax should be assessed. The question of title should not be unnecessarily de-

terminated on this appeal, for all the parties do not appear to be represented.

The value placed by the appraiser upon the farms transferred is challenged by the appellant as being excessive and not warranted by the proof.

While the appraiser determined the value of the several farms to be the maximum value testified to, the finding is supported by some evidence and will not be disturbed on this appeal.

The order appealed from should be affirmed.

Order affirmed.

Matter of the Probate of the Last Will and Testament of
CHARLES FERDINAND HOFFMAN, Deceased.

(*Surrogate's Court, Kings County, November, 1909.*)

SUSPENSION OF POWER OF ALIENATION—EFFECT OF SEPARABILITY OF ESTATES
—SEPARATE TRUSTS FOR MORE THAN TWO LIVES.

WILLS—INTERPRETATION AND CONSTRUCTION—DISPOSAL OF THE ENTIRE ESTATE—EFFECT OF DEATH, UNCERTAINTY OR INVALIDITY OR INCAPACITY OF LEGATEES OR DEVISEES—ACCELERATION OF SUBSTITUTIONAL OR SECONDARY ESTATES.

A testator gave to each of three female relatives a pecuniary legacy to be held in trust for them by a trustee and directed that the income thereof should be paid only to the beneficiaries and without control of any person; that each of them so electing should have a portion of the trust funds with which to purchase and furnish a home to be held in her own right free from any control whatsoever and that the remainder of the principal should remain in trust as a protection in old age. The testator directed his residuary estate to be placed in trust for the sole benefit of his mother, the income to be all paid her without the control of any other person, his intention being to provide her with funds in her old age against all possible contingencies and, at her death, the principal and the accumulated income, if any, were to be divided *pro rata* among the aforementioned pecuniary legatees, respectively, upon the basis of their respective legacies, subject to the trust restrictions appertaining to their several legacies. By a codicil to the will he gave to each of two other persons, both of whom and

his mother died before the testator, a pecuniary legacy and made them, upon the death of his mother, *pro rata* residuary legatees under the same terms and conditions. *Held:*

The estate, if any, of those named as beneficiaries to take upon the death of testator's mother, was accelerated by her death and the will was to be construed as if it contained no suspension during her life and as if its direction were that the residue should be disposed of in the manner indicated with respect to the first three specific legacies subject to any modification derivable from the codicil.

There was an attempted trust as to the residuary estate under which the principal was devised to the trustee in trust to apply the income to the benefit of the first three persons named as legatees and the persons named as legatees in the codicil but in such proportions as their so-called legacies should bear to the aggregate of their legacies.

The persons named in the codicil as participants in the supposed trust having died before the testator, the specific legacies to them as well as their interests in the residuary lapsed; and, whether the specific legacies fell into the residuum or became the subject of intestacy, it resulted that the only beneficiaries who might take under the trust, if valid, were the first mentioned legatees.

As to each of said first mentioned legatees there was a valid separate trust of one of the several fractions of the residue which was subject to no limitation or suspension for any period other than the life of the person for whom the specific fraction was to be held in trust.

Affirmed 140 App. Div. 121.

Proceeding upon the probate of a will.

Whitridge, Butler & Rice (Edwin T. Rice and Benjamin A. Morton, of counsel), for proponent Margaret Hoffman and for Carolyn Hoffman; Miller, King, Lane & Trafford (Edwin T. Rice and Benjamin A. Morton, of counsel), for Union Trust Company; Charles W. Dayton, Jr. (Edward D. Bryde, of counsel), for Rosalie A. Avery, Inez Hoffman Spagnolo and Joseph L. Bourdette, contestants; J. Brownson Ker, special guardian, for infants Grace Hoffman, Bertha Hoffman and Myrtle Hoffman; Clarence P. Avery, appearing in person.

KETCHAM, S.—The construction of the will of the testator is required by answers filed in the probate proceeding. The portions of the will necessarily involved are as follows:

"Article I. I grant and bequeath unto my niece Margaret Hoffman seventy-five thousand dollars (\$75,000).

"Article II. I grant and bequeath unto my niece Carolyn or Carrie Hoffman, fifty thousand dollars (\$50,000).

"Both the foregoing legacies shall be held in trust as herein provided in article VIII and no husband of the legatees nor any relative or person shall have any control whatsoever over either the principal or income thereof. The income shall be paid only to said legatees respectively and an amount of ten thousand dollars (\$10,000) of the principal may be paid to each of them if they so elect when they attain the age of 30 years, to purchase and furnish a home severally to be held in their own several names and right, free from any other control whatsoever.

"The remainder of their respective legacies shall remain in trust as provided above as a protection or provision in their old age, and in case of the death of either of them without issue, before the death of their Aunt Inez Hoffman legatee under article IV herein, then the share of such decedent shall in such event revert to her the said Inez Hoffman. And in case either said nieces should die without issue subsequently to the death of their aunt the said Inez Hoffman and prior to the death of their grandmother, Caroline Hoffman, then in such case their respective shares shall in like manner revert to their grandmother, Caroline Hoffman.

"Article IV. I grant and bequeath unto Henrietta Louisa Hoffman, commonly known to the family as Inez Hoffman, the sum of one hundred and twenty-five thousand dollars (\$125,000) with the proviso that the same shall be placed in trust as herein provided in article VIII and the income thereof be paid to herself only, no relative of hers nor any husband that she may ever have, nor other person shall have any control whatsoever over either the principal or income hereby devised, with this proviso however that she may if she wish draw not exceeding ten thousand dollars (\$10,000) with which to purchase and furnish a

home for herself to be held in her own name and right, free from all other control whatsoever. In case of her death without issue and prior to that of her mother, all her interest therein shall revert to her mother. I furthermore hereby transfer and make over to the said Inez Hoffman, all my right, title and interest in and to the estate of my mother Caroline Hoffman in the city of New Orleans, State of Louisiana.

"Article VI. I make and appoint my mother Caroline Hoffman, residing in the city of New Orleans, State of Louisiana, my residuary legatee, the amount to be placed in trust as herein provided in article VIII for her sole benefit, and the income thereof to be paid to her without the control of any other person whatsoever, the intenton being to provide her with funds in her old age against all possible contingencies. At her death, the principal and any accumulated income there may be, shall be divided *pro rata* between the legatees named in articles I, II and IV herein respectively upon the basis of their respective legacies herein and to be subject to the same trust restrictions stated herein appertaining to their several legacies hereunder."

By article VIII the will appoints a trustee for all the trusts created herein, "with the confident belief that the provisions of this my last will and testament will be faithfully and conscientiously administered and that my legatees hereunder, who are all wholly ignorant of sound business principles or methods, may receive wise counsel and advice on financial matters affecting their interests."

By a codicil the sum of \$25,000 was substituted for the amount bequeathed in article IV to Inez Hoffman. The codicil also contains two specific bequests to Wilhelmina Bourdette of \$35,000, and to John F. Hoffman of \$10,000; and the last two legatees are the subject of the following language in the codicil: "And I hereby make these two legatees, upon the death of my mother, *pro rata* residuary legatees under the terms and conditions as set forth in article VI herein, as additional residuary legatees."

Caroline Hoffman, named in paragraph six of the will, and Wilhelmina Bourdette and John F. Hoffman, named in the codicil, all died before the testator's death. It is admitted that the estate amounts to \$2,300,000.

The mother, named as the primary beneficiary in article VI, having died before the testator's death, the estate, if any, of the persons named as beneficiaries to take upon her death is, therefore, accelerated, and the will is to be read as if it contained no suspension during the mother's life and as if its direction were that the residue should be disposed of in the manner indicated in articles I, II and IV with respect to the specific sums therein mentioned, subject to any modification to be derived from the codicil.

There is, then, an attempted trust as to the residue, under which the principal thereof is devised to the trustee in trust to apply the income to the benefit of the persons named as legatees in articles I, II and IV of the will and the persons named as legatees in the codicil, but of such proportions as their so-called legacies shall bear to the aggregate of their legacies. The persons named in the codicil as participants in the supposed trust having died before the testator's death, their legacies, as well as their interests in the residue, lapsed; and, whether their legacies fall into the residue or are the subject of intestacy, it results that the only beneficiaries who may in the first instance take under the trust, if valid, are the persons named in articles I, II and IV.

Calculation shows that the proportions in which the income is assigned to them are one-half, one-third and one-sixth.

It is argued that the beneficial interests of these legacies are undivided, that the aggregate estate is directed to be held *in solido* throughout their successive lives and that the suspension for three lives is thus made possible. No such result would follow if within the contemplation of the will there is a division of the residue in the hands of the trustee in the proportions of one-

half, one-third and one-sixth and each portion thus ascertained is made the subject of a separate trust.

"Every estate granted or devised to two or more persons in their own right shall be a tenancy in common unless expressly declared to be in joint tenancy." Real Property Law (C. L.), § 66.

This provision and its predecessors have been frequently applied to conditions substantially such as are found in the will under consideration. *Everitt v. Everitt*, 29 N. Y. 39, 72; *Stevenson v. Lesley*, 70 id. 512, 515; *Monarque v. Monarque*, 80 id. 320, 324; *Wells v. Wells*, 88 id. 323, 332; *Matter of Verplanck*, 91 id. 439, 443; *Vanderpoel v. Loew*, 112 id. 167, 177; *Schermerhorn v. Cotting*, 121 id. 48, 56; *Locke v. Farmers' L. & T. Co.*, 140 id. 135, 144; *Corse v. Chapman*, 153 id. 466, 473.

These cases all show the solicitude of the law to preserve the testamentary purpose, if possible, and, in order to avoid the suspension of the power of alienation, to find by every fair and reasonable art of construction a division of the estate into distributive shares. In some cases there is displayed a determination to save the will even against its adverse language.

In the cases of *Verplanck*, 91 N. Y. 439, and *Vanderpoel v. Loew*, 112 id. 167, there were express requirements in the will that the estate in the hands of the trustee should not be separated but should be held intact and indivisible; yet, despite language which explicitly solidified the entire estate for the period of the trusts, the beneficial estates were held to be distributed into as many parts as there were beneficiaries. Indeed, in the *Vanderpoel* case, though the will designated the parts as "undivided," it was held that these "undivided" parts, however held by the trustee, were to be construed as separate and divided among the beneficiaries for the purpose of saving the will.

In the instrument under inquiry now, not only is there no expression declaring or intimating that the interests of the bene-

ficiaries are to be held in joint tenancy, but there is a provision that, upon the death of the mother, the principal of the trust "shall be divided between the legatees named in articles I, II and IV * * * respectively," subject to the trust provisions.

There is then a separate trust as to each of the fractions of the residue which is subject to no limitation or suspension for any period other than the lives of the persons for whom the specific fraction is to be held in trust. The validity of these three trusts may be tested by tracing the destination of any one of the three distributive funds.

As an example controlling all, the trust for Margaret Hoffman may be selected. In her case one-half of the residue is limited upon the same "trust restrictions" as pertain to the so-called legacy to her of \$75,000, in the first article. The "restriction" in this regard is that the income shall be paid only to the beneficiary and without control of any person, that a portion of the principal of the trust may be applied to a prescribed use and that the remainder of the principal shall remain in trust as a protection or provision in the old age of the beneficiary.

While not expressed, there is a sound implication that the income is payable to her during her natural life. The direction that the income shall be paid to her, amplified by the requirement that the remainder of the principal shall remain as a protection and provision in her old age, can only mean that it shall be payable during her life. Nor can it be that the testator designed a payment of income in old age without embracing in his purpose its continuance so long as age continued.

But it is said that beyond the life of Margaret there is a suspension for more than one life to follow hers. The argument is based upon the language by which it is directed that upon the death of Margaret the "share" of Margaret shall revert to Inez Hoffman. It is contended that the only "share" which can be called the "share" of Margaret is her right to receive the in-

come, and that, not only as to the legacy of \$75,000, but as to her interest in the residue, the gift over upon her death would bestow upon the next taker only the right to income and would still leave the principal in the hands of the trustee for a period beyond the first life.

It is hard to see that under this view, if accepted, there would be a suspension for more than two lives in being at the time of the testator's death for the right of the second taker to receive the income could not survive his own life and the trust would then end. The "share" intended by the will, however, is not the mere right to receive income. The context indicates that this "share" of the decedent beneficiary, which is to revert to another upon her death, is the principal fund assigned in the will as the "share" to which she bears a beneficial relation.

This principal fund is first "granted and bequeathed" to her by words which, if unqualified by the subsequent trust, would vest the principal in her. However the testator's employment of language may differ from legal usage, it still remains to evidence his intention that the legatee, as he calls her, is to have and enjoy the legacy, as he calls it, to the utmost, consistently with the trust restrictions. It is her legacy which is held in trust.

After the payment to her of \$10,000 for her home, it is not merely the principal of the trust fund, it is "the remainder of her legacy," which is to remain in trust. When, after this conception of her personal ownership of the fund as her legacy (however impossible to give legal effect to the conception) the testator slips into the use of the word "share," he must be regarded as intending by the word "share" the same thing as was in his mind when he used the words "remainder of her legacy."

In the provision that the "share" "revert," the testator gave slight support for the conclusion that the word "share"

in his mind stood for the principal fund; for the principal could "revert," while the beneficiary's mere right to receive income must cease with her death and strictly could not "revert."

Thus the trust was such that upon the death of Margaret it ceased, and there was no suspension beyond her life.

It is not within the present inquiry to determine upon whom the principal fund created by article I, or the residue mentioned in article VI, is to be devolved in case of the first beneficiary's death, with or without issue. The ultimate destination of the principal is not material, except so far as its discussion is necessary to the determination of the validity of the trust.

To that end it is enough that, upon the death of the first beneficiary, the fund escapes from the trust restriction and finds a legal owner whose power of alienation is untrammelled. *Matter of Mount*, 185 N. Y. 162.

If these views are correct, there is a valid devise in trust of the \$75,000, as well as of one-half of the residue, to the trustee to pay income to Margaret Hoffman for life and upon her death to make over the subject of the trust to persons who may then be ascertained. The same conclusion must follow, with variation of amounts and proportions, in respect to the provisions for Carolyn Hoffman and Inez Hoffman.

Upon the failure of the legacies in the codicil to Wilhelmina Bourdette and John F. Hoffman, the amounts of their legacies became part of the residue.

"A general residuary clause * * * will include legacies which were originally void, either because the disposition was illegal, or because, for any other reason, it was impossible that it should take effect; and it includes such legacies as may lapse by events subsequent to the making of the will. It operates to transfer to the residuary legatee such portion of his property as the testator has not perfectly disposed of." *Riker v. Cornwall*, 113 N. Y. 116, 124.

The cases cited in support of the claim that intestacy results from the lapse of these legacies all arose upon gifts of fractional shares in the estate to several persons in common and not jointly. Among them *Matter of Kimberly*, 150 N. Y. 90, is typical. There the residue was given to three sisters named. Upon the death of one before the testator's death, it was held that her share did not vest in the surviving sisters, since the gift was not joint and was not a gift to a class.

The questions there considered could not arise where, as in the case at bar, the legacies were of specific sums of money; and, while the *Kimberly* case must be accepted as authority that a gift of a part of the residue which fails does not, like other lapses, become a part of the residue, there is no occasion to widen its application.

The will is admitted to probate, and the decree should embody a construction of the will in accordance with these conclusions.

Probate decreed.

Matter of the Judicial Settlement of the Account of THOMAS MARTINUS, as Trustee under the Last Will and Testament of MARTIN SCHRAMM, Deceased.

(Surrogate's Court, Kings County, November, 1909.)

ACCUMULATION—WHAT IS ACCUMULATION—OMISSION TO PROVIDE FOR APPLICATION OF INCOME.

TRUSTS—PURPOSES FOR WHICH EXPRESS TRUSTS ARE VALID—PASSIVE TRUSTS.

WILLS—INTERPRETATION AND CONSTRUCTION—DISPOSAL OF THE ENTIRE ESTATE—DISPOSAL OF LAPSED OR VOID DEVISES OR REQUESTS OR OF OTHERWISE UNDISPOSED PROPERTY—INCOME NOT DISPOSED OF.

A residuary estate, after a devise thereof in trust to collect and pay the income thereof to testator's daughter for life, was devised and bequeathed, in equal shares, to all his grandchildren who might survive him, with direction to the trustee to pay over the share of each grandchild upon its arriving at majority and, in the event of the prior death of any of them leaving lawful issue, such issue to receive

the share the parent would have taken if living, and, in the event of the death of any grandchild before reaching full age without lawful issue, its share was directed to be distributed among testator's surviving grandchildren, share and share alike. Testator was survived by his daughter and two grandchildren. At the institution of a proceeding for an accounting of the trustee, the daughter was dead and one of the grandchildren was of full age and the other an infant.

Held, that during the life of the testator's daughter the trustee held the legal title; that upon her death one-half of the trust fund was liberated from the trust but the remaining one-half was to remain in the hands of the trustee until the infant grandchild should be entitled to receive the principal, or, upon his earlier death, it be determined whether the payment should be made to his lawful issue or to the grandchild then surviving.

The provisions of section 73 of the Real Property Law, that a disposition of property to one in trust for another is invalid if it be intended that the beneficiary shall have the right both to possession and profits, is limited to a passive trust for a person intended to have the whole and the absolute use and has no application where the disposition of the property is to one grandchild in one event and to another in the alternative.

There being no express requirement that the income should be accumulated, the mere fact that there was no disposition of the income by the will in terms could not impose upon testator's scheme a feature which would result in its destruction; but in each case the income would be payable to the person presumptively entitled to the next eventual estate.

Proceeding upon the account of a trustee.

Charles H. Haubert, for trustee; Richard Mott Cahoon, special guardian, for William Scherzenger; Mahlon A. Freeman, for Joseph Scherzenger.

KETCHAM, S.—The will requiring construction contains in its third paragraph a well-expressed devise of the residue, in trust, to collect the income and to pay the same over "unto my daughter, Otilie Scherzenger, for and during the term of her natural life." The will then proceeds as follows:

"Fourth. Upon the death of my said daughter, Otilie Scherzenger, I do give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal of whatever name

and nature and wheresoever the same may be situate, unto all of my grandchildren, who shall survive me, in fee simple, absolutely and forever, equally share and share alike, and I direct my said trustee to pay over the share of each grandchild as soon as they arrive at the age of twenty-one years.

"Fifth. In the event of the death of any of my grandchildren before they arrive at the age of twenty-one years leaving lawful issue, him or her surviving, it is my will that such lawful issue shall receive the share that their parent would have taken if living; in the event of the death of any of said grandchildren before they arrive at the age of twenty-one years without lawful issue, him or her surviving, it is my will that in such event, the share of the one so dying without lawful issue as aforesaid, shall go and be distributed among my surviving grandchildren equally share and share alike."

The decedent left him surviving, interested in his will, the daughter named in the third paragraph and the grandchildren, Alvina Herrmann and William Scherzenger. The daughter died May 25, 1909. Alvina Herrmann was twenty-one years old at the inception of this proceeding. William Scherzenger is still an infant.

The sole question is whether or not, as to one-half of the estate payable to William Scherzenger as soon as he arrives at the age of twenty-one years, the trust shall prevail until he attains the said age or shall sooner die.

There was a sound trust for the benefit of Ottilie Scherzenger during her life, and for that period the trustee held the legal estate. This trust once instituted could not cease upon the death of the life tenant, unless at that time there was a person who had the right to immediate ownership and possession.

One-half of the fund is liberated from the trust, for there is a person entitled to that portion. As to the other one-half, there is no such person, since, if it be paid to anybody, it may turn out to have been paid to the wrong person. Unless the trust beyond the first life is invalid, the fund must remain in the hands of

the trustee until William shall attain his majority and become entitled to receive the principal fund or, upon his earlier death, it be determined that the payment shall be made to his lawful issue or to the grandchild who shall then survive him.

It is sought to bring this trust within the rule that the disposition of property to one in trust for another is invalid if it be intended that the beneficiary shall have the right both to possession and profits (Real Prop. Law, § 73; *Snedeker v. Congdon*, 41 App. Div. 484); but the disposition in this case is to one grandchild in one event and to another in the alternative, and cannot be controlled by a statute clearly limited to a passive trust for a person intended to have the whole and absolute use.

The trust is attacked upon the further claim that it provides for an accumulation of income which, though primarily for the infant William Scherzenger, during minority, may possibly be for the benefit of a surviving grandchild who is adult. There is no express requirement that the income shall be accumulated, and the mere fact that there is no disposition of the income by the terms of the will cannot impose upon the testator's scheme a feature which would result in its destruction.

If the trust be otherwise valid, the rents instead of accumulating would go to "the person presumptively entitled to the next eventual estate;" and the will is to be regarded as if it embodied a direction to that effect. *Smith v. Farmer Type Founding Co.*, 16 App. Div. 438, 444.

Under this view the one-half is to be held somewhere in suspense until its ultimate owner shall be determined by the death or majority of William, and, in the meantime, the income is to be paid to him. By whom can this fund be held pending this determination, unless it shall remain in the hands of the trustee under the trust to pay the income?

The decree of distribution should accordingly provide that, as to one-half of the residue, it shall be held and administered by the trustee and its income paid to William Scherzenger.

Decreed accordingly.

**Matter of the Probate of the Nuncupative Will of GEORGE
O'CONNOR, Deceased.**

(Surrogate's Court, Kings County, December, 1909.)

WILLS: THE TESTAMENTARY INSTRUMENT OR ACT—JOINT OR MUTUAL NUNCUPATIVE OR FOREIGN WILLS—NUNCUPATIVE WILLS—WHEN ALLOWABLE OR PROPER; EVIDENCE AS TO MAKING OF NUNCUPATIVE WILL: PROBATE ESTABLISHMENT AND ANNULMENT—PROBATE—PROCEDURE—PETITION—SUFFICIENCY OF PETITION FOR PROOF OF NUNCUPATIVE WILL.

A mariner at sea may orally make an effectual disposition of his personal estate which shall have full testamentary effect, and, besides testamentary capacity and freedom from restraint, the only essentials are that the act shall be performed with testamentary intent and shall be sufficiently explicit and intelligible to permit a finding of its purport and scope, and that its execution be proved by at least two witnesses.

A resident of this State who was chief engineer of a steamship then upon the high seas and within two days of port, while confined to his room from a particular seizure of a chronic malady, after stating to the master and the first officer of the ship that he was afraid "this was going to be a very bad spell for him" said that if anything happened to him everything was to go to his daughter Lizzie, and these facts are proved by the testimony of both the master and the first officer of the ship, the execution of a nuncupative will is established, though the testator afterwards recovered sufficiently to return to duty on board ship, but a few days later, having landed, died while proceeding to his home.

Sickness, while not necessary to the validity of the execution of a nuncupative will, afforded ground for believing that the act, which might not have had testamentary meaning if done in health, assumed the gravity and significance of a will when done by one confronted by death.

The petition for probate need not allege the words and phrases intended to be proved as the will of the decedent as the only requirement of the Code is that a petition for probate shall describe the will propounded.

Proceeding upon the probate of a will.

Thomas Costigan and Denis A. Spellissy, for proponent;
Charles H. Kelly, for public administrator, as administrator of

the estate of George O'Connor, deceased; M. V. Dorney, special guardian, for unknown heirs at law and next of kin.

KETCHAM, S.—The proponent alleges that the decedent made an oral or nuncupative will which should be admitted to probate.

There is no case in the history of this court in which a like will has been propounded and modern instances of nuncupation are rare. Still, the rules are plain.

The common law permitted nuncupative dispositions and its principles are still alive, save so far as they are affected by statutory provisions, as follows:

(a) "No nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual military service or by a mariner, while at sea." Decedent's Estate Law, § 16.

(b) "Before a nuncupative will is admitted to probate, its execution and the tenor thereof must be proved by at least two witnesses." Code Civ. Pro., § 2618.

The cases on the subject are: *Hubbard v. Hubbard*, 8 N. Y. 196; *Prince v. Hazelton*, 20 Johns. 402; *Matter of Thompson*, 4 Bradf. 154; *Matter of Gwin*, 1 Tuck. 44.

And the antiquarian will find the development of the law touching nuncupative wills in the following books: *Jessup's Surr. Pr.* (3d ed.), § 305; 1 *Jarman Wills*, *79; 30 *Am. & Eng. Ency. of Law*, 560, *et seq.*; *Page Wills*, § 232; *Chapl. Wills*, 429; *Rood Wills*, § 228.

From these authorities it may be derived that a mariner at sea may orally make an effectual disposition of his personal estate which shall have full testamentary effect, and that, in addition to the general rules regarding testamentary capacity and freedom from restraint, the only essentials are that the act shall be performed with testamentary intent and shall be sufficiently explicit and intelligible to permit a finding of its pur-

port and scope, and that its execution must be proved by at least two witnesses.

Though at common law the requirement was finally developed, even before the Statute of Frauds (29 Car. II, chap. 3), that the nuncupative transaction, to be effectual, should ordinarily be made in the last sickness and in prospect of death, there is no trace that this requirement even applied to soldiers in actual service or sailors at sea, and certainly there is none to show that it now applies to them.

Before the enactment of 29 Car. II, soldiers and mariners were regarded as a favored or privileged class of testators; and there was no suggestion that their right to make an oral testament when, in one case, upon actual military service or, in the other case, at sea was dependent upon illness or fear of death therefrom. Indeed, it is quite obvious that the fear of death which was supplied by sickness in the case of those who made oral wills at home was sufficiently furnished, in the case of sailors or soldiers, by the perils of the sea or the presence of the enemy.

The act referred to placed restrictions upon nuncupation, but only upon the express provision that "Any soldier being in actual military service, or any mariner or seaman, being at sea, may dispose of his movables, wagons and personal property as he or they might have done before the making of this act."

This was the state of the English law at the time of the colonization of New York, and there has been no statutory exception engrafted thereon. The English statute referred to was almost literally reproduced in the earlier statute in this State regarding wills.

It seems clear, therefore, that the oral will of the soldier or sailor may be valid, whether or not the same was made in the last sickness. While there is no express authority to this effect in this State, the rule is clearly stated by Mr. Surrogate Brad-

ford, though *obiter*, in the Thompson case, *supra*, in the words following: "As well because the wills of soldiers and mariners were excepted from the operation of the provisions of the Statute of Frauds, as for the reason and ground of the exception, and the peculiar character of the military testament, it was never held requisite that these nuncupations should be made during the last sickness."

In submitting to this view it may well be remarked that its dangerous effect is that a mariner's oral will, once made at sea, may remain for his lifetime and may be proved by the mouth of two witnesses, however long after the event and however ample the testator's opportunities for a deliberate statutory will may have been in the meantime.

In the case at bar there is no insincerity, interest or other feature attaching to the witnesses to the transaction in question which impairs either their personal worth or the intrinsic credibility of their story. It affirmatively appears that the testator was in the full possession of his faculties and that he was under no restraint. The circumstances of the act alleged as his will were as follows:

The testator was the chief engineer of the steamship *Dorothy*, then upon the high seas, within two days of the port of her destination. He was a resident of the State of New York. He had a chronic malady and its nature and fatal tendencies had been stated to him by his physician.

At the time in question, he was suffering from a particular seizure which was an event and development of his established ailment. He was confined to his room, though he afterwards recovered sufficiently to return to duty on board ship, and a few days later, having landed, he died on the cars while proceeding to his home.

The witnesses by which it is sought to prove the execution and tenor of the will are the master and the first officer of the ship.

The former testifies that in the presence of the first officer and himself the deceased said that "he was afraid that this was going to be a very bad spell for him; he was afraid that something would happen to him."

The witness' further statement is: "We asked him if there was anything we could do in case he did not get over it; he said 'No, except that everything I have belongs to my daughter.'" Q. "Did he mention her name?" "Yes, my daughter Lizzie."

On later examination the captain says of the words of the deceased on the same occasion, "I think he said, 'Everything I have is going to my daughter' or 'I want my daughter to get everything I have.'"

The first officer, now the master of the steamship *Wilhelmina*, testifies that, on the occasion described by the first witness, the captain and he were both present when the testator said "that if anything happened to him everything was to go to his daughter Liz."

In a different version of the same conversation he again says of the deceased, "He told us that if anything happened to him all he has goes to his daughter Liz. He told me and Capt. McDonald that, if anything happened to him, everything was to go to his daughter."

The proponent was the stepdaughter of the deceased and was undoubtedly nominated by the use of the words 'Liz,' "Lizzie" and "my daughter." The deceased left no widow or ascertainable next of kin, and the controversy in this proceeding is between the stepdaughter and the State of New York. The decedent left no real estate.

The only apparent question is whether or not the deceased, when he employed the words described by the witnesses, made his declaration with testamentary purpose and deliberation. "It should be borne in mind, that as well the testator as all of the witnesses were seamen, and were undoubtedly acquainted

with the rights of mariners in regard to making their wills." Hubbard v. Hubbard, 8 N. Y. 196, 202.

The finding must, therefore, be either that he thought he was making a vain and useless utterance or that he invested his act with all the solemnity and purpose of a will. Sickness may not be necessary to the validity of the transaction, but it affords ground for believing that the act which might not have had testamentary meaning, if done in health, assumed the gravity and significance of a will when done by one who confronted death.

There is satisfactory evidence that, on the 4th day of January, 1909, this testator, while a mariner at sea, made his nuncupative last will and testament by which he bequeathed to Elizabeth Hughes all the personal estate of which he might die possessed.

The motion made in behalf of the State that the petition be dismissed, on the ground that it does not allege the words and phrases intended to be proved as the will of the decedent, is denied. The only requirement of the Code is that a petition for probate shall describe the will propounded (Code Civ. Pro., § 2614), and this is sufficiently done in this proceeding.

The dictum in Redfield's Law and Practice (§ 242), that the petition should set forth "the particular words or language which it is proposed to establish as a will," is not supported by any authority cited by counsel or discovered by the court; and it cannot be taken to impose upon the requirement of the Code, § 2614, any more than its ordinary meaning.

The will is regarded as established and may be admitted to probate upon findings setting forth the tenor thereof.

Decreed accordingly.

Matter of the Estate of ALFRED GILMAN, Deceased.

(Surrogate's Court, Sullivan County, December, 1909.)

WILLS—THE TESTAMENTARY INSTRUMENT OR ACT—REVOCATION AND ALTERATION—RIGHT TO REVOKE OR ALTER AND HOW ACCOMPLISHED—INTENTION SHOWN BY EXECUTION OF SECOND WILL.

A will containing no revocation clause revokes all prior wills of the testator if it is inconsistent therewith and disposes of his entire estate.

Where a testator who was a resident of this State, having duly executed his last will therein, afterward executed another will, while temporarily sojourning in another State where he had large real estate holdings, which disposes of his entire estate and clearly shows that his intention was to have it supersede and take the place of the former will, the former will be deemed impliedly revoked by the later will, though the later will contained no revocation clause and named no executor.

Proceedings upon the probate of a will.

C. E. & S. M. Cuddeback, for proponent of 1890 will; Wm. Pinkney Hamilton, Jr., for heirs and next of kin; George H. Smith, for certain legatees; George L. Cooke, for certain legatees; William B. Niven, for Charles H. Gilman.

ROOSA, S.—On the 3d day of February, 1909, Alfred Gilman died in the city of New York, being at the time of his death a resident of the county of Sullivan, N. Y. On the 15th day of February, 1909, Charles F. Van Inwegen of the city of Port Jervis, N. Y., filed in the office of the surrogate of the county of Sullivan an instrument purporting to be the last will and testament of Alfred Gilman, deceased, dated March 30, 1890, accompanying which was a petition praying for the probate of said will.

On the 17th day of February, 1909, William P. Hamilton, Jr., as attorney for the heirs and next of kin of the said Alfred

Gilman, deceased, also filed a petition in the Surrogate's Court of the county of Sullivan, praying for the probate of a paper purporting to be the last will and testament of Alfred Gilman, deceased, dated the 31st day of March, 1894. Said will had previously been filed in the surrogate's office, it having been transmitted from the office of the County Court of the county of Milwaukee in the State of Wisconsin, in pursuance of an order of the Milwaukee County Court, in a proceeding instituted in said court to have said will removed from Wisconsin to the Sullivan county surrogate for probate. To the probate of the will offered by Charles F. Van Inwegen, dated March 30, 1890, objections were filed by all of the heirs and next of kin of said deceased. To the probate of the will dated March 31, 1894, objections were filed by Charles F. Van Inwegen, the said Van Inwegen being named in the will dated March 30, 1890, as executor. The matter coming on for a hearing before the surrogate, an order was entered on the 12th day of April, 1909, requiring that the proceedings for the probate of said respective papers purporting to be the last wills of said Alfred Gilman, deceased, be consolidated, and that all testimony taken therein be considered as applying to each of said wills.

For the purpose of convenience in referring to these papers, I shall designate them as the will of 1890 and the will of 1894. Both of these instruments appear to be perfect and complete wills, duly executed and regularly attested according to statute. The 1890 will was drawn at Port Jervis, N. Y., on the day it bears date, by Mr. Cuddeback, an attorney standing high in his profession. It was carefully prepared in accordance with the requirements of the statute of this State. The 1894 will was drawn in the city of Milwaukee, Wis., where Mr. Gilman was temporarily sojourning. Mr. Gilman had large real estate holdings in Wisconsin and Michigan, and from the testimony in this proceeding it is evident he had frequent occasion to employ attorneys to look after his many and varied interests there.

The 1894 will was drawn by a Milwaukee attorney who had been retained by Mr. Gilman and who clearly was a most reputable attorney, enjoying a large practice and who, doubtless, was familiar with the statute in reference to the requirements of the drawing of wills. This will of 1894 has no revocation clause. Evidence has been offered by attorneys now practicing at the Wisconsin bar as to the law in Wisconsin, at the date of its execution, in regard to implied revocation; and the Wisconsin statute has also been offered in evidence regarding the Statute of Wills. Wisc. Stat., 1898, § 2290; *Matter of Fisher*, 4 Wisc. 254.

With both wills properly established, the next question is whether the will of 1894 revokes the will of 1890.

The law on the question of implied revocation is clearly settled in this State, where a will containing no revocation clause revokes all prior wills, if it is inconsistent with them and if it disposes of the entire estate. Does the will of 1894, therefore, dispose of the entire estate of Alfred Gilman, deceased? If it does and if it is inconsistent with the 1890 will, then it follows that the will of 1894 should be admitted to probate, regardless of the fact that there is no revocation clause.

In construing testamentary dispositions, the law endeavors to get at the intention of the testator and by a careful and painstaking analysis of the instrument to reach such a conclusion as in the opinion of the court was desired by the testator. It is the duty of the court, in the examination of testamentary instrument, to give such construction as will effectuate the intention of the testator. *Tilden v. Greene*, 130 N. Y. 39.

The rule runs through all the law that, where a will has been carefully executed under the solemnity of the statute, courts should closely scan it and not allow a testator's last wishes regarding his property to be nullified, if from the context his intention can be understood. In *Matter of Campbell*, Judge Gray says: "The object of the Statute of Wills is to effectuate

that which is proved to be the last will of the deceased." In the Vanderburgh case, Judge Parker says: "A will should be so construed as to carry out the intention of the testator unless some positive rule contravenes." It is insisted, on the part of the proponents of the 1890 will, that there is no entire inconsistency in the two wills and that both instruments should be allowed probate; that, if a part of the estate of the testator is disposed of and there is no clause of revocation, then the will only revokes a former will in so far as it is inconsistent. It is a revocation *pro tanto*. It is very clear that Alfred Gilman did not intend to die intestate.

The court in *Henderson v. Henderson*, 113 N. Y. 16, says: "Courts should endeavor by every reasonable intendment, and by a liberal construction, to sustain a testamentary disposition of property when in so doing they give actual and just effect to the testator's purpose." A will may operate as a revocation of a former testamentary instrument where there is an inconsistent disposition of the previously devised property. 1 Jarman Wills, 134.

It is unnecessary to elaborate further on this legal proposition, or to cite other authorities in support of it.

Now, let us look at the conditions existing at the time the 1894 will was executed. The deceased was at that time in Saint Joseph's Hospital, Milwaukee, Wis., where he was being treated for some ear trouble.

There is no question raised by the evidence but that the deceased was of sound and disposing mind and fully able and competent to dispose of his estate; and it is most natural to imagine that, during the time of his enforced stay in the hospital, where he had leisure to consider the large property interests which he owned, the subject of the disposition of the same should be one for him to carefully decide upon.

Therefore, it was no more than to be expected that, having settled in his own mind how he wished to dispose of his prop-

erty, he should send for his attorneys and have his will legally prepared. Whether Mr. Gilman knew anything about a revocation clause or not is not for us to say, but he had placed the drawing of the will in the hands of a reputable attorney and, having done so, expected a legal document to be prepared for him to execute. There is nothing in the evidence to show that the 1890 will was referred to in any particular by Mr. Gilman in the preparation of the 1894 will. Four years had passed since the 1890 will was drawn and many and great changes had taken place. Under the 1890 will the deceased left a legacy of \$10,000 to Margaret Kelley. In the 1894 will this legacy was reduced to \$5,000. It is very clear that he did not intend to leave her \$15,000, but rather to reduce her legacy from \$10,000 to \$5,000. Again, in the 1890 will he gives to his wife, Mary Gilman, \$50,000. In the 1894 will he leaves nothing to her, for the reason that she had died after the date of the 1890 will, and prior to the execution of the 1894 will.

It is noticeable that, when the second will was drawn, Mary Gilman having died, the deceased left legacies to various members of her family, that is, the Boyd family. Further, there are five persons named in the first will, to wit: Andrew Campbell, John Murran, Samuel Johnson, John Lanigan and Henry Lanigan, who are not referred to in the 1894 will. When the 1890 will was executed, these men were in Mr. Gilman's employ in Forestburgh, this county. In 1894 Mr. Gilman had left Forestburgh, having given up his business there and gone to Milwaukee. His interests were then mainly in Wisconsin and Michigan. When the first will was drawn, at Port Jervis, he doubtless had a desire, that as faithful employees, these men, Campbell, Murran, Johnson and Lanigan, should receive something from his bounty.

If I recall the evidence correctly he had given all of them sums of money on various occasions, and to Lanigan's memory (who had died subsequently to the 1890 will) he had erected a monument.

It is a noticeable fact that John Calhoun, to whom \$1,000 was left in the 1890 will, was also a beneficiary under the 1894 will in the same amount. Clearly the testator did not intend to give Calhoun \$2,000; and his selection of Calhoun from those employees, formerly named, would indicate that he thought he was making a new will which would take the place of any prior will, and that Calhoun was the only one of his old employees whom he desired to share in his estate. Furthermore, the 1894 will disposed of his property mainly to those who were of his kin and who would naturally be the objects of his bounty, his three sisters being named as his residuary legatees.

The will of 1894 is, therefore, inconsistent with the 1890 will and clearly shows that the intention of the testator was to have it supersede and take the place of the former will. It also provides for the disposition of the entire estate. The fact that the 1894 will names no executor has no bearing whatever on its validity.

In *Austin v. Oakes*, 117 N. Y. 598, the court says: "Where provisions are repugnant it is our duty to preserve the *paramount intention of the testator at the expense even of some subordinate particulars.*" See *Taggart v. Murray*, 53 N. Y. 233.

There is no mistaking, after a careful examination of all the evidence and of the will of 1894, that the paramount intention of the testator was to have that will revoke all former wills. It is the duty of courts to guard well the wishes of decedents and to see that they are faithfully carried out.

The authorities cited by counsel have been carefully examined by me and, after an earnest endeavor to construe these two instruments in order to effectuate the intention of the testator, I have reached the conclusion that the will of 1894 should be admitted to probate and I deny probate to the 1890 will.

Let a decree be entered accordingly.

Matter of the Application of EDWIN E. HIGGINS, to Revoke the Letters of Administration of GERTRUDE S. SHARP, Otherwise Known as GERTRUDE S. HIGGINS, as Administratrix of THOMAS C. HIGGINS, Deceased.

(Surrogate's Court, Kings County, December, 1909.)

JURISDICTION—NATURE AND ESSENTIALS IN GENERAL—PRESUMPTIONS—
EFFECT OF RECITALS IN JUDGMENT.

Where, upon petition to remove an administratrix from office upon the ground that at the time of her marriage to the intestate she was the wife of another, she answers that at the time of her marriage to decedent she had obtained a divorce from her former husband in a court of competent jurisdiction in Ohio, a recital in the judgment entered in that action that: "The defendant having been legally summoned by publication and having failed to appear, the court find the defendant in default for answer or demurrer to said petition and find that the allegations thereof are confessed by him to be true," is to be construed as equivalent to a statement that the defendant had at no time appeared in said action prior to the rendering of the judgment; and against such statement in the judgment a stipulation, made part of the record, subscribed by an attorney for the defendant, acknowledging service of a notice in said action, has no force as an appearance; and, the court having acquired no jurisdiction of the person of the defendant, the letters of administration should be revoked.

Application to revoke letters of administration.

Sparks & Fuller, for petitioner; Jay & Smith, for administratrix.

KETCHAM, S.—This is an application to revoke the letters of the administratrix on the ground that, at the time of her marriage to the intestate, she was the wife of another then living.

The answer of the administratrix is that at the time of her marriage to the decedent she had obtained a divorce from her former husband in a court of competent jurisdiction in Ohio.

The question upon which this application depends is whether or not in the action for the divorce there was, in behalf of the defendant therein (the former husband), such appearance as would give to the court jurisdiction over his person.

In that action the defendant was served by publication and made default in pleading. Thereafter, and at a time when otherwise the court had no jurisdiction of the defendant's person, the following instrument was made a part of the record of the court in this action:

"Service of the above notice is acknowledged and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived, also all exceptions as to time.

"Done this 15th day of June, 1892.

"FREDERICK W. SHARP by JOHN ANDREWS his
attorney.

"JOHN ANDREWS, attorney for defendant."

The paper last quoted referred to a notice that depositions would be taken to be used as evidence in the trial of the cause; and the defendant, in whose behalf this instrument was signed, has testified in the present proceeding that the attorney who thus signed in his behalf was retained by him to appear for him in the action in question.

The judgment entered in that action contained the recital: "The defendant having been legally summoned by publication and having failed to appear, the court find the defendant in default for answer or demurrer to said petition and find that the allegations thereof are confessed by him to be true."

Whatever might otherwise be the significance of the stipulation signed in the defendant's name, it can have no force against the declaration contained in the judgment that "the defendant has failed to appear." It can scarcely be said that the words "having failed to appear" are susceptible of the mean-

ing that the defendant had failed to appear within the time which had elapsed at the return of the summons or that the past period contemplated by the word "having" was any particular segment of the entire past. The entry of judgment being dated and its recitals and decretal provisions all being in the present, the words "having failed" refer to all time preceding the utterance and are to be regarded as equivalent to "having failed at all time which has passed."

In giving full faith and credit to a record from another State, the exceptional meaning of words must be avoided unless circumstances require that construction; and, when there are no qualifying facts, the normal and the obvious meaning of words should prevail.

This record asserts that the defendant had not appeared at the time of the judgment, and the court, therefore, had no jurisdiction of the person of the defendant. There is nothing in the pretense that the decree was obtained in the State of marital domicile. It was not.

The letters should be revoked.

Matter of the Appraisal of the Estate of GEORGE SMITH, Deceased, Under the Act in Relation to Taxable Transfers of Property.

(Surrogate's Court, Kings County, December, 1909.)

SURROGATES' COURTS—PROCEDURE AND REVIEW—ORDERS AND DECREES—OPENING, VACATING AND CORRECTING—PROCEDURE TO OPEN OR SET ASIDE DECREES—HOW INSTITUTED.

Proceedings to reopen or vacate decrees of a Surrogate's Court may be instituted by an order to show cause or notice of motion and the issuance and the publication of a citation are not required, though the executor is a resident of a foreign jurisdiction.

Application to reopen a decree assessing a transfer tax.

Daniel Seymour, for State Comptroller; Henry W. Jessup, specially appearing for respondent.

THOMAS, S.—The only question presented, or which can properly be considered upon this appeal, is as to whether the executor of the decedent now moving was properly brought before the court by an order to show cause served upon him by mail, he being a resident of a foreign jurisdiction, instead of by a citation issued and published in the form required to initiate the proceedings in this court that are required by law to be so commenced. It has for many years been the practice in this court to initiate proceedings in this court for the reopening or vacating of decrees by order to show cause or notice of motion; and, since the decision of Mr. Surrogate Rollins in *Cluff v. Tower*, 3 Dem. 253, the propriety of this procedure must be considered as finally settled. The practice in the Supreme Court is the same. *Cluff v. Tower*, *supra*; *Furman v. Furman*, 153 N. Y. 309; Code Civ. Pro., §§ 1282, 1283.

Application denied.

Matter of the Judicial Settlement of the Account of THE FARMERS' LOAN AND TRUST COMPANY, as Executor Under the Last Will and Testament of CHARLES PALMER, Deceased.

(*Surrogate's Court, Kings County, December, 1909.*)

TRUSTS—TERMINATION AND ABOGATION OF TRUST—FULFILLMENT OF PURPOSE.

WILLS—INTERPRETATION AND CONSTRUCTION—CONDITIONS, CONTINGENCIES AND ALTERNATIVES—PARTICULAR TERMS OF DOUBTFUL MEANING—BECOMING "FINANCIALLY SOLVENT."

Where, under the will of a testator, a trust fund is directed to be paid over to the beneficiary whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of the trust fund, and the beneficiary, after the testator's death, upon his voluntary petition in bankruptcy, is discharged from all his debts, he is thereby brought within the language of the will and entitled to receive the fund.

Proceeding upon the judicial settlement of the account of an executor.

Turner, Rolston & Horan, for executor; Gerrit Smith, for Francis J. Palmer; Frederick I. Pearsall, special guardian.

KETCHAM, S.—The will of the decedent provided as follows:

"Fourth. I give and bequeath and direct that there shall be paid as soon as conveniently may be after my death, to The Farmers' Loan and Trust Company, the sum of fifty thousand dollars, to be held by said The Farmers' Loan and Trust Company, In Trust, for the following uses and purposes, to wit: To invest said money and keep it invested in such securities as to my said Trustee may seem proper, and to pay or apply the net interest or income thereof to or for the use of my son Francis J. Palmer, quarterly during the term of his natural life. It is my wish in making this provision that my said son shall have the principal of said trust fund whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund. In order to carry out this design I expressly authorize and empower my said Trustee, upon receiving a written statement from my said son saying that he is financially solvent and able to pay his just debts and liabilities from resources other than the principal of this trust fund (which statement my said Trustee may act upon without further investigation) or upon receiving such additional evidence of the facts as in its judgment may require, to pay over to my said son, absolutely in its own judgment, and without its judgment in such case being subject to revision by any other person or authority, the principal of the said trust fund, and thereupon his receipt for said trust moneys shall be full justification and acquittal to the said Trustee for the payment thereof."

At the time of the testator's death, Francis J. Palmer was in-

debted in large sums and had no money of his own with which to pay the same. After his father's death, upon his voluntary petition in bankruptcy, a decree was entered duly discharging him from all debts provable against him under the Bankruptcy Law; and it is assumed, as the arguments all suggest, that the only debts owing by him at the time of his father's death were the subject of the discharge.

The said Francis J. Palmer has filed with the trustee a statement whereby he alleges that he is "financially solvent and able to pay all his just debts and liabilities from resources other than the principal" of the trust fund created by the language quoted *supra*.

Upon the motion of the trustee the question arises as to whether or not, under the construction of the paragraph of the will quoted *supra* and the facts shown, the trustee is under the duty of paying to the son the sum of \$50,000 mentioned in the said paragraph.

In *Young v. Young*, 127 App. Div. 130, the beneficiary was entitled to the trust fund if he should "discharge" all his debts and liabilities and "be in the judgment of the executors entirely solvent." The court say: "We think that the testator intended merely to put the property devised and bequeathed by said sixth paragraph beyond the reach of the creditors of said son. He said nothing about qualities which the son should show in order to be entitled absolutely to said property, and the requirement that the son should discharge his debts and liabilities, coupled as it was with the provision that he should be, in the judgment of the trustee, entirely solvent, shows what the testator intended. One is solvent who is able to pay his debts and liabilities, and, in determining solvency, debts which had been discharged by bankruptcy proceedings or upon which any remedy was barred by the Statute of Limitations could not be considered. The testator intended merely that the son should be freed from debt, and he did

not prescribe any method by which that freedom from debts should be secured."

The reasoning which is applied to a case where the verbal requirement was that the son should do an affirmative act, viz., "discharge his debts," loses nothing in application to the present case, where the duty of the trustee depends, not upon the doing of any act by the son, but solely upon his attainment of a certain personal condition. If his present situation comes within the terms of the will, he is entitled to the fund, whether that situation has been achieved by his efforts or has happened to him.

That he is financially solvent must be confessed under the decision quoted. Associated with the term "financially solvent" are the words "able to pay his just debts," etc. These two expressions are not at variance and were not introduced into the will to neutralize or endanger each other's meaning. The latter member of the expression "able to pay," when coupled with the words "financially solvent," is to be known by the company it keeps; and the ability to pay, which was in the testator's thought, must be construed to have been that sort of ability which consorts with and does not exceed or distort the meaning contained in the words "financially solvent."

Moreover, the son here concerned is able to pay his just debts, since there are none left which are legally enforceable. Whether "just debts" include obligations formerly enforceable, but later made subject to defenses and so longer enforceable by law, has been determined in situations not unlike the case at bar. The common direction in a will that "all just debts shall be paid," or that testamentary dispositions shall take effect "after the payment of just debts," is held not to include debts once due but now subject to the defense of the Statute of Limitations. *Martin v. Gage*, 9 N. Y. 298; see also 4 Words & Phrases Judicially Defined, *sub nom.* "Just Debts," p. 2902. The same rule is laid down with regard to debts directed to be paid to which the

defense of infancy at the time of the making of the debt is available. *Smith v. Mayo*, 9 Mass. 62; 6 Am. Dec. 28. Such a direction in a will is said not to avail a creditor who, holding an otherwise just debt, neglects the usual means of proving demands until after the estate is closed. *Collamore v. Wilder*, 19 Kan. 67. Under a statute that upon assessment for taxation "just debts" shall be deducted, it is said: "The use of the term 'just debts' in the statute plainly implies that legal, valid and incontestable obligations must be shown in order to entitle the estate to the benefit of the statute." *People ex rel. Osgood v. Commissioners*, 99 N. Y. 154.

In the will under consideration, the testator directed that "all his just debts be paid." Is it conceivable that in the same instrument he used the same expression to mean two different things; first, when applied to his own debts, and secondly, when applied to the son's debts?

The beneficiary is able to pay all debts which are "just" in law. Those which the law will not make him pay if he invokes a defense which the law has given him cannot be "just."

The conclusion is that, whether or not the executor accepts the certificate or written statement of the beneficiary, it is become one of the express conditions of its trust that the son shall have the principal of the trust fund, because he has become "financially solvent and able to pay all his just" debts and liabilities from resources other than the principal of this fund. The jurisdiction of the surrogate has not been questioned and is possibly ample to justify the direction that the decree shall provide for the payment of the \$50,000 accordingly.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of CHARLES H. LOTT and MOE S. LOTT, as Executors of the Last Will and Testament of ADOLPHUS BENNETT, Deceased.

(Surrogate's Court, Kings County, December, 1909.)

EVIDENCE—PRESUMPTIONS—BIRTH, DEATH AND SURVIVORSHIP—SURVIVORSHIP.

EXECUTORS AND ADMINISTRATORS—ACCOUNTING AND SETTLEMENT—PROCEDURE TO OBTAIN ACCOUNTING—FINAL ACCOUNTING BEFORE SURROGATE—EVIDENCE AND PRESUMPTIONS ON APPLICATION—BURDEN OF PROOF.

In a proceeding brought by executors for the judicial settlement of their account, the affirmative of the issue and the burden of proof belong to those who claim under a gift of decedent's personal estate to his wife by his will, where both husband and wife perished upon the same occasion and directly or indirectly as a result of the same events and under the same circumstances that it is doubtful which died first.

In such a case, as where both perished in the same casualty, no presumption arises of the survival of either so as to enable one to inherit or take by will from the other.

Proceeding for the judicial settlement of the accounts of executors.

Charles F. Moody, for accounting executors; Delos McCurdy, for executor of Mary E. Bennett; Hubbard & Rushmore (James C. Church, of counsel), for executors of William R. Bennett; James C. Church, for Katharine R. Bennett et al.

KETCHAM, S.—This is a proceeding for the judicial settlement of the accounts of executors. Under the will of the testator, his wife was the sole beneficiary. The wife has died, leaving a will which contains specific and residuary gifts. Both testators died under circumstances which make necessary this inquiry to determine whether, by the wife's survival of her husband, his estate vested in her and passed in turn from her by her

will, or, by her failure to outlive her husband, his estate became subject to the laws relative to intestacy.

The account concerns personalty only, and the conflict is confused by the fact that one of the executors of the husband's will is not only the sole surviving executor of the wife's will, but is the father of certain legatees therein named. The executor, occupying this dual attitude, has properly retained independent counsel to represent him in each of these relations.

The trial proceeded upon the ruling that the affirmative of the issue as to whether Mrs. Bennett survived her husband was with those who claimed under the devise in the husband's will, but the court is now asked to reconsider this view upon the briefs presented.

If the duty of opening the proof was erroneously imposed, it was a substantial invasion of a right, and a new trial would follow. *Woodriff v. Hunter*, 65 App. Div. 404, and cases cited.

It is merely the question as to procedure in developing the evidence and not the weight or value or preponderance of proof that is involved in this reargument. It is insisted that, whatever may be the general rule of evidence, the burden was assumed in this instance by the persons claiming the intestacy of Mr. Bennett, because they brought a proceeding to require these executors to account, and therein not only alleged that Mrs. Bennett predeceased her husband, but prevailed upon the acceptance of that allegation.

This argument is stated in behalf of the executor Moe S. Lott, as follows: "These next of kin, from the death of Adolphus Bennett to the present hour, have stood in this court asserting that they are entitled to his property, notwithstanding his will to the contrary, for the sole reason that he survived his wife — that he lived the longest and, consequently, that the gift in his will lapsed.

"1. All authority agrees that he who makes this assertion assumes the burden of proving it."

It is true that he who makes an assertion assumes the burden of proving it, but it is true only with this obvious qualification, that the assertion must be made in the proceeding in which the question as to burden arises. There is the same separation between the compulsory proceeding and the present proceeding as there is between two actions between the same parties upon independent causes of action for wholly diverse relief; and neither in an action nor in a proceeding was it ever heard that resort could be had to the pleadings in the former case to determine the nature of the later issue. The former proceeding had ended before this present proceeding commenced. The latter has its own pleadings and by them only are its issues to be defined.

"The law is settled in this State that there is no presumption of survivorship in the case of persons who die by a common disaster. In the absence of satisfactory evidence, the fact is assumed to be unascertainable, and the property rights are disposed of as if death occurred at the same time, not because of the presumption of simultaneous death, but because of the absence of evidence or presumption to the contrary." *Matter of McInnes*, 119 App. Div. 440.

This expression was limited to the consideration of the preponderance of proof and was not addressed to the question as to who held the affirmative, but the rule as to the presentation of evidence seems to be therein involved, for if in a case absolutely bare of evidence the law will conclude that the deaths were simultaneous and will dispose of property rights as if upon a finding that both persons died together, then the duty of opening and closing proofs must rest upon him who would be defeated if no proof were taken.

It cannot be denied that, if Mr. and Mrs. Bennett died at the same moment, the wife would not take under the husband's will. *Matter of Wells*, 113 N. Y. 396; *St. John v. Andrews Institute*, 117 App. Div. 698.

In the case last cited not only is the doctrine stated as to the

result of the evidence when taken, but the guide for the taking of evidence is given as follows: "When, therefore, evidence was adduced showing that they all met death in the same conflagration, it was incumbent upon the administrator of Mrs. St. John (legatee in the will in question), in order to entitle him to receive the legacy given to her under the will, to prove facts and circumstances tending to show that she survived the testator, and the burden of proof of establishing this fact, upon which his right to the legacy depended, was upon him."

In *Newell v. Nichols*, 12 Hun, 604, is found the opinion of Mr. Justice Van Vorst, frequently resorted to and always with admiration as the repository of the learning material to this discussion. In that opinion it was held, as to persons who perished in a common disaster, that "the burden of establishing the survivorship rests upon the party who claims any portion of the estate through such fact."

This result was affirmed by the General Term and the Court of Appeals, without attempt to add to the reasoning upon which it was based. See S. C., 75 N. Y. 78.

In *Young Women's Christian Home v. French*, 187 U. S. 401, the facts appeared by stipulation and no controversy as to which party should open and close the debate was possible. The Supreme Court says: "The rule is that there is no presumption of survivorship in the case of persons who perish by a common disaster, in the absence of proof tending to show the order of dissolution, and that circumstances surrounding a calamity of the character appearing on this record are insufficient to create any presumption on which the courts can act. The question of actual survivorship is regarded as unascertainable, and descent and distribution take the same course as if the deaths had been simultaneous;" and, as suggested *supra* with regard to equivalent words in the *McInnes* case, 119 App. Div. 440, the intimation from this language, not to be avoided, is that the party who would fail if the deaths were simultaneous must make the first proof.

In all the American cases on the subject, the case of Underwood v. Wing, 4 De Gex, M. & G. 633, is adopted as the basis of the rule of evidence in this country. In that case the reason for the imposition of the affirmative upon the party alleging survivorship is stated as follows: "In the absence of any effectual disposition of the beneficial interest in the personalty, the next of kin is entitled to it, and the person seeking to dispossess him of it is bound to prove a perfect title, and to rebut the *prima facie* case of the next of kin. * * * Where a person dies seized in fee of real estate, *prima facie* his heir at law is entitled to succeed, and he can only be deprived of that right by some devisee coming forward and showing that a will valid in point of form and effectual in point of substance was made displacing his rights. I am perfectly persuaded that exactly the same principle is applicable to the case of personal estate: if a person dies possessed of personal estate, *prima facie* the next of kin will be entitled to it, and their right will only be displaced by some person coming forward and showing a valid and effectual disposition taking it away from them.

"* * * On whom does the burden of proof rest to show whether the wife did or did not die in the testator's lifetime? I think, the principle once being admitted that the *prima facie* title is in the next of kin, that it must rest on the person who claims the property under a bequest giving it to him in that particular event. It is not for the next of kin to show that the wife did not die in her husband's lifetime; but the person who claims under the disposition must show, not that probably it might be one way or the other, but that that state of circumstances did in fact occur which entitles him according to the language of the will to say that the wife did die in her husband's lifetime."

There seems to be no occasion for retracting the theory upon which the trial was conducted, and there remains the question of fact: did Mrs. Bennett survive her husband?

The known facts are as follows: On February 3, 1908, between ten thirty and eleven o'clock in the evening, there were

no persons in the home of the decedent except himself, his wife and Margaret Wigley, a servant who had been in their household for fourteen years.

The maid, having retired for the night, came from the upper part of the house in response to the call of Mr. Bennett. Mrs. Bennett was then lying on the floor, where she remained to the end of her life. The husband left Mrs. Bennett in the care of Miss Wigley and went to his brother's house, about 100 feet away. His nephew, J. Remsen Bennett, summoned from the neighboring house, immediately came to the house in which Mrs. Bennett was lying, and was immediately followed by his uncle, the decedent.

The night was cold and windy. It is partially shown and may well be assumed that the decedent, Mr. Bennett, exerted his utmost strength in the journey to his brother's house and return. While Mr. Bennett and his nephew, J. Remsen Bennett, were in the room opening into the room in which Mrs. Bennett was lying, Mr. Adolphus Bennett lost consciousness, was momentarily supported upon his feet by his nephew and was by the latter lowered to the floor, about fifteen feet from the place where Mrs. Bennett lay.

Upon the call of Mr. J. Remsen Bennett, the maid thereupon left the side of Mrs. Bennett, after the husband was stricken, and ministered to the latter. She did not return to the side of her mistress. Neither she nor any person gave any care or attention to Mrs. Bennett, from the time when Mr. Bennett sank to the floor until the time when the family physician pronounced both husband and wife dead, and they were carried to the upper part of the house for the care which the dead require.

At about twenty minutes past eleven, Dr. Ager arrived, looked at Mrs. Bennett from a distance of more than fifteen feet and gave his attention to Mr. Bennett, until persuaded that he was beyond aid.

Before the arrival of the doctor, Mr. Moe S. Lott, who lived in the neighborhood, and Miss Katharine Bennett, who had both

been called by telephone from their homes in the immediate neighborhood, came to the decedent's house; but their testimony is not given and there is no suggestion that either of them took any part in the attempt to restore the life of either Mr. or Mrs. Bennett.

Upon this texture of conceded proof, dispute is imposed by the testimony, on the one hand, of Margaret Wigley, tending to show that Mrs. Bennett survived her husband, and the testimony of J. Remsen Bennett and Dr. Ager of contrary effect.

Miss Wigley testifies that, at the time that Mr. Bennett was stricken, she felt the pulse of Mrs. Bennett beat; that it was beating when she went to Mr. J. Remsen Bennett, who was holding his uncle; that at the same time Mrs. Bennett was breathing; that she (the witness) could see the movement of her chest; that her chest was moving up and down and that the movement of her chest was a natural movement as (far as) she could see; that Mrs. Bennett's face was perfectly natural, not drawn up or discolored, or anything of that kind. As to Mr. Bennett, Margaret Wigley says that when he was lowered to the floor he was not breathing, that he had the appearance of a man who was dead and that he never moved again.

Mr. J. Remsen Bennett testifies that when he entered the room in which his aunt was lying he noticed the appearance of her face; that it was very white and drawn; that her whole face was drawn and that as to her general complexion his aunt at times had considerable color; that previous to this time she was very full blooded; that he did not notice his aunt breathing at all.

Being allowed, notwithstanding his interest in the event, to testify as to occurrences in the presence of his uncle's person, at a time when, according to the testimony of both Miss Wigley and himself, his uncle was unconscious, Mr. J. Remsen Bennett says that he went to the side of his aunt, while his uncle was upon the floor, got smelling salts and a bottle of whiskey, which

were alongside his aunt, and went back to his uncle; that at that time his uncle was breathing heavily; that he (the witness) worked his uncle's arms for nearly ten minutes; that, after the witness had ceased working, his uncle was lying across witness's knees and the witness was on the floor; that there was a time when he left his uncle's body off his knees on the floor, and that at that time the heavy breathing had ceased; that ten minutes later the physician arrived and commenced working with his uncle's body; that the physician loosened his collar and apparently felt of the heart, lifted his head with the assistance of the witness and that then the body was placed on the floor. Mr. J. Remsen Bennett says that, on placing the body on the floor, he noticed a sinking of the body, a relaxation of the body, as it was laid down.

Dr. Ager testifies that, at about twenty minutes after eleven, upon his arrival, he saw Mrs. Bennett's body first (before he saw the body of Mr. Bennett); that at that time he went no nearer to her than eighteen or twenty feet; that she was evidently dead; that her color had changed and she had the customary appearance of a corpse; that her eyes were partly open and partly shut, and that the simple sight of her corpse was sufficient to show him she was dead; that he turned and saw Mr. Bennett lying upon the floor, a few feet from Mr. J. Remsen Bennett; that Mr. Adolphus Bennett's color was good, his natural color; that it (the natural color) had not left his face at all; that he could not find that his heart was beating; that he was unable to determine whether or not he was breathing and that his appearance was that of a faint.

After describing his endeavors to resuscitate Mr. Bennett, the physician says: "Then the change came and the color went out of his face and he had then the same appearance that Mrs. Bennett had when I came in; the color left his face thoroughly, his eyes were half open as they are in a corpse."

The doctor then noticed the appearance of the wife's person

and says with detail that the condition then observed indicated that death had taken place some time previous.

It would not be profitable to trace all the processes by which the conclusion has been reached, not only that Mrs. Bennett did not live longer than her husband, but that she died before his death.

There is no need for expressing any doubt whatever of the sincerity of Miss Wigley's testimony, but there are defects and infirmities in her recital which would impair her credibility, even if there were not opposing evidence. She makes it certain that after she left Mrs. Bennett's person she did not return, and that, from that time, though she remained, no care was given to Mrs. Bennett by her or any other person, until the physician, about twenty minutes later, pronounced her dead.

In this interval, Miss Wigley was without employment, except that she telephoned to two witnesses. If this disregard on her part was the result of a disturbance of her faculties, which might well have followed the horror and grief of the occasion, we might respect the loss of her reason; but we would follow in her senseless steps if we should accept her testimony as to events of nice and almost imperceptible gradation which are said to have occurred while she was deprived of the powers of calm observation.

Whether Mrs. Bennett was breathing, whether her pulse was beating, and whether her face was natural in color and form, are questions too close and delicate for the arbitrament of a witness who was so bereft of rational impulses as to forget her mistress and friend at a time when, according to her testimony, she believed her to be still within the zone of resuscitation. But the greater significance of the maid's conduct is that, however shocked or disabled, a woman who had just left the side of one whom she loved would return if she believed her friend and benefactress to be still alive. The intuitions of womanhood, too vital and persistent to be obliterated even by grief or terror,

seem to constrain the conviction that, in desisting wholly from any endeavor in behalf of her mistress for more than twenty minutes, the maid gives the highest assurance that life had left her mistress before she herself had left her.

Miss Wigley's testimony is impaired by the zeal, if not the irresponsibility, with which she presumes to affirm matters both of fact and inference which would indicate that Mr. Bennett died upon his feet at the instant of his attack. Her extreme fidelity to the theory which she is called to support is seen in the statement that Mrs. Bennett's face was perfectly natural and showed nothing the matter with it. This is scarcely conceivable under the circumstances shown, whether the lady was already dead or was within twenty minutes of actual death. Her evidence as to Mrs. Bennett's appearance is opposed by Mr. J. Remsen Bennett and Dr. Ager and is rejected.

There is testimony that, as to whether Mrs. Bennett was dead before Mr. Bennett was stricken, Miss Wigley's declaration before the trial was irreconcilable with her testimony. Her examination, as to whether she had talked before the trial about the occurrences detailed in her testimony, compels the conviction, either that her testimony was in this respect and, therefore, in others, untruthful, or, as it is kinder to believe, that she has not a sober appreciation of the value of words used by her under oath.

In a case where trifles light as air are confirmation, it has seemed well to recall the blemishes inherent in this witness's testimony, for they justify the mind in preferring the testimony of Mr. J. Remsen Bennett and Dr. Ager, although one is an interested witness and the other, largely through his own temperance and restraint, falls short of demonstrative proof.

The decree must provide for the disposition of the estate accounted for in accordance with the laws which govern in cases of intestacy.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of MAGDALENA EYSEL, as Administratrix of FERDINAND E. EYSEL, Deceased.

(Surrogate's Court, Kings County, December, 1909.)

GIFTS—IN GENERAL—PARTICULAR INSTANCES—BANK DEPOSITS IN JOINT NAMES OF DONOR AND DONEE.

HUSBAND AND WIFE—PROPERTY OWNED JOINTLY OR IN COMMON—JOINT DEPOSIT IN BANK.

The intention which the law imputes to husband and wife who deposit moneys to their joint credit, that the money shall belong to the survivor, is founded not upon the legality of their marriage relation but upon the impulses which it has been found ordinarily affect persons sustaining such a relation to each other.

Such an intention is not repelled by the fact that their marriage was unlawful by reason of the husband having a prior wife living at the time of its solemnization.

Nor is the arrangement that the woman sustaining to him the apparent relation of wife should receive portions of the money from time to time at the discretion of a third person, made by the supposed husband in preparation for his departure to a foreign country, inconsistent with the intention that in case of his death she should have it all.

Proceeding upon the account of an administratrix.

George Gru, for accounting party; Frederick S. Taggart (R. B. Knowles, of counsel), for objectors; M. A. O'Neil, special guardian.

KETCHAM, S.—This administratrix was appointed upon her claim that she was the wife of the intestate, and her letters were revoked upon the finding that she was not. Objection is made that she has not charged herself in this account with the sums on deposit in a bank account hereinafter described, or with the avails of a note made to the intestate and herself.

Her claim is that the bank deposit and the note became her own upon the death of the intestate.

The deceased having moneys deposited in his own name surrendered the book in which the deposit was recorded and caused the amount then appearing thereon to his credit to be deposited in the same bank in the names of himself and this administratrix, as follows: "Ferdinand Engelh. Eysel and Magdalena Eysel."

The note in question was dated in February, 1908, and was made to the order of Ferdinand E. Eysel and Magdalena Eysel. The court will find that the consideration for this note proceeded from the intestate.

There was a ceremony of marriage between the deceased and this administratrix on September 13, 1902. They lived as husband and wife for the rest of his life, except that he went to Europe in August, 1908, where she shortly joined him; but in 1872 the intestate entered into a ceremony of marriage with Marie Eysel, who still survives.

It appears from the record in evidence of the proceedings for the revocation of the letters of this administratrix that Marie, when married to the intestate, was the wife of another, then living. From the union of the intestate with Marie there were begotten five children.

In 1896, the intestate obtained judgment against Marie, annulling his marriage with her, upon the allegation and finding of her former marriage.

A few months later, in the same year, the intestate sought his former wife and renewed relations with her under conditions which would constitute a contract of marriage if there were no impediment to marriage on the part of either of them. There was no such obstacle, for Marie's former husband had died before the decree of annulment was entered.

It was upon these facts that it was held, in revoking the letters of the present accountant, that the intestate was lawfully

married to Marie in 1896; that the marriage then entered into subsisted for the rest of his life and that there was no validity in the marriage which was solemnized between the intestate and the administratrix.

As to whether the accountant, in her apparent marriage and in the association by which it was confirmed, acted in sincerity and good faith, there is no evidence save the ceremony itself; and from that alone the just conclusion is that she did not make a mock of its solemnities, but did believe that it was a valid and honorable transaction, unincumbered by any prior engagement of the intestate.

It is settled that, where a husband deposits his own moneys in the names of himself and his wife, or invests his own moneys in a security in the same manner, his act, in the absence of evidence to the contrary, evinces an intention to benefit his wife to the extent of a right of survivorship in the fund so deposited or invested. *West v. McCullough*, 123 App. Div. 846.

This rule, whenever expressed, has been applied only to parties to an actual and lawful marriage. In a transaction clearly of a nature to bestow the right to the fund upon the woman, if she were the lawful wife, is the same rule less controlling when it appears that there was a *de facto* marriage, in which the woman, though in law lacking the actual right of wifehood, was in good faith persuaded that her relation was marital and the man, whether or not he was aware of the flaw in his marriage, maintained every attitude and form of conduct which a lawful spouse would exhibit.

In the ordinary case of deposit by a real husband, the rule does not depend upon the essential fact of marriage; it arises from the impulses which would ordinarily be found to affect two persons who were married.

The original rule is that a deposit made or a security taken in the names of any two persons, whatever their relation, may be made the subject of an intention and arrangement that in

case of death the survivor shall be entitled to the fund. This arrangement may be shown by express contract or by circumstances.

Among the circumstances from which the intention may be gathered, the marital relation is influential, not as a condition or prerequisite of any compact, but merely as a fact affording probability that the intention existed. In such case the wife does not take by legal operation dependent upon her right of wifehood, but does take because the depositor, being her husband, and naming his wife in association with him, has given sound evidence of an intention that the person so associated shall have the right of survivorship. The marriage is the basis for the conclusion that the deposit, which between strangers might not have imported a contract for survivorship, takes another meaning when the deposit concerns two persons whose conduct and intentions toward each other are influenced and shaped by their consciousness and recognition of a marriage between them.

The fact of wedlock is, therefore, only important as a reflection and record of their mutual feelings and purposes. Its use is merely evidentiary. It tends to show, and if unqualified by other evidence it does show, that the depositors have thought and acted as two persons ordinarily think and act under the sway of marital obligation when such a deposit is made.

It is made plain in *West v. McCullough*, *supra*, that it is the probability of intention which flows from marriage, and not the fact of marriage itself, which gives reason to the rule there reaffirmed. There is no longer survivorship in the wife as to a chose in action payable to husband and wife named together and, unless there is evidence of an intention to benefit her, the surviving wife cannot be entitled to the fund.

The same sources of evidence and the same finding of the intention would be present where the two parties to the deposit, though in law not married, sincerely and reasonably believe

themselves to be man and wife. Then the man making the deposit would by his act, when read in the light of his love and his duty toward his supposed spouse, give proof that he meant that the fund should be hers upon his death. The evidence of his wish and arrangement as to the bank account would be no less convincing if it should thereafter appear that a former wife, believed to be dead, was still alive, and that the deposit had been made between two persons who were matrimonial strangers.

Is there evidence of the intention where the deposit is made in the names of two persons to a ceremonial marriage, one of whom (the husband) is bound by a former marriage still subsisting, and knows it, and the other of whom (the wife) has neither doubt, nor ground of doubt, that the marriage is valid?

The woman's attitude, for every evidential relation to the transaction, is the same as if she were a true and honorable wife. The man's attitude is as if he said: "My wife, because we are married according to every ordinance of church and State, I make this deposit in the form by which the law regarding like transactions between man and wife will make the money yours if I shall die before you. My act has the same purpose and is intended to have the same result upon my death as it would have if done by any man having a wife."

The effect of his deposit or investment is to be measured, not by what he had in mind, but by what was in the mind of her to whom the benefit was proffered. Did he intend her to believe and rely upon his conduct in the same manner and to the same degree as wives, in like case, are by law invited to believe and rely?

The money was his and was capable of bestowal upon her in case of his death by means of this form of deposit. It only needed that he should characterize and explain the deposit by any act sufficient to evidence the intention that she should have it in the event mentioned. This act he did, unless the finding is to be that he meant to deceive the woman in his lifetime and

to mock her from the grave. It is enjoined by law and charity that men's conduct and language shall be taken as straight rather than devious, true to their natural and open meaning rather than to any hidden reservation.

There is no reason to believe that there was any covert purpose in this man's conduct, and his deposit and investment in the joint note constitute evidence an intention and arrangement that the amounts to be realized therefrom upon his death should belong to the accountant.

As to the bank account, the same result would be reached by another path. "Joint tenancies of savings bank deposits may, however, be created, if so the parties intend, irrespective of whether the tenants be husband and wife, and in such case the right of survivorship exists." *West v. McCullough*, supra.

Evidently these compacts have been supported without resort to the theory of survivorship *ex jure uxoris* (for that has been abolished), or gift (for that would require delivery), or contract (for that would require consideration), or trust (for a trust needs a declaration), or testamentary disposition (for that must conform to the statute).

The transaction is without a name. It is said to be "the creation of a joint tenancy," "an intention to benefit the survivor which requires nothing to be done to effectuate that intention."

All that has been written in behalf of this arrangement comes to this: If the fund stands in two names and the owner has intended that upon his death the survivor shall enjoy the remnant, the transaction is effectual. The cases look only for evidence of the intention.

In the case at bar, as to the bank deposit, at least, this intention appears, whatever were the relations of the parties.

The intestate closed the account standing in his sole name and on the same day deposited his entire balance in the same bank to the credit of himself and the person now claiming the

deposit. This later form of the account was maintained during the rest of his life, nearly a year.

In 1908, upon the eve of his departure for Europe, it appears, by testimony which is accepted, that the intestate said that he gave Mrs. Eysel (the present accountant) \$2,200 in the German Bank in New York city, in her name (obviously referring to the deposit in question); that he further said "then if he did not come back, she should have all the money that he left, because the children (of his earlier marriage) had nothing to do with the cash money that he had in the bank."

He said in the same talk, as a reason for his expression in her favor: "She was so good to him before he got married, because he needed money. * * * She gave him \$1,200 of her own money, because he did not draw out all the money for what he needed." He said that "the money he gave her, \$2,200" (the amount of the deposit charged to their joint credit) "belonged to her."

The effect of his conduct in changing the deposit and of this statement made in explanation thereof is not impaired by the testimony of a witness that the intestate, in preparation for his absence from the administratrix, arranged that she should receive portions of the deposit from time to time at the discretion of the witness. This arrangement was consistent with an intention that she should have the sum remaining on deposit at his death. The provision for her concerned not the sums contained in the deposit, but their remnant at his death; and his solicitude that they should not be unwisely depleted does not impair, but rather supports, her claim.

The act of the accountant in signing a receipt for the bank-book and the note in her capacity as administratrix, though given full force as her declaration against her present contention, does not detract from the force of the conduct and statements of the intestate.

When he changed his bank deposit from his own sole name to

the names of himself and the accountant, the act unquestionably betokened an intention that his money should be held and disposed of in some way other than would have been its disposition if it had remained to his sole credit. It is equally certain that the intention to change the condition of the moneys concerned the person whose name was added to the account.

This depositor has avowed his intention that the person joined ments, supplies evidence quite as forcible as any evidence derivable from the act of a husband who, without any declaration of his purpose, has merely made the joint deposit.

The depositor has avowed his intention that the person joined with him in the deposit should have all if he did not come back. He gave sound reason, if he did not prove consideration, for his arrangement in her behalf; and he said that the amount of the deposit belonged to her.

The objection that the accountant does not charge herself with the amount of the bank balance and the note is overruled, on the ground that both have belonged to her since the death of the intestate.

Decreed accordingly.

In the Matter of the Final Judicial Settlement of the Accounts of ANSON C. BROOKS, as the Executor of the Estate of CYRUS BEEBE, Deceased.

(Surrogate's Court, Madison County, December, 1909.)

EXECUTORS AND ADMINISTRATORS—DEBTS AND LIABILITIES OF THE ESTATE—EXHIBITION, ESTABLISHMENT, ALLOWANCE AND ENFORCEMENT OF CLAIMS—STATUTES OF NON-CLAIM OR SHORT STATUTES OF LIMITATIONS OF CLAIMS—APPLICATION OF STATUTES—EXCEPTIONS—INFANCY.

The rejection of a claim against the estate of a deceased person presented by a minor does not set in motion the short Statute of Limitations contained in section 1822 of the Code of Civil Procedure, but her special guardian, upon the judicial settlement of the estate, may present the claim and prosecute any remedies appropriate to its enforcement and collection.

Proceeding for the judicial settlement of the account of an executor.

E. W. Cushman, attorney for executor and petitioner; W. E. Lounsbury, special guardian, for Beulah E. Melvin, attorney in person.

KILEY, S.—I cannot find that the question here under consideration has ever been passed upon by the courts of this State. In order to understand the circumstances a brief history of the proceedings is as follows:

On the 6th day of July, 1908, Cyrus Beebe died in the town of Hamilton, in this county, leaving a last will and testament, which was duly admitted to probate, and in and by which Anson C. Brooks was named as executor. He duly qualified and entered upon the discharge of his duties, and ever since has been, and is now, acting as such executor. The will gave all of decedent's property to his wife, Maria Beebe.

The widow, Maria Beebe, subsequently died, leaving a last will and testament, which contains the following provision:

"Ninth: I give and bequeath unto Bulah Melvin, daughter of Frank Melvin, Six Hundred Dollars, which sum is bequeathed with the understanding that it is to pay her for her services in full, from the time she came to work for us, until my decease. And in case the said Bulah Melvin, or her representatives shall ever sue, or in any way try to recover any sum for her services from my husband's or from my estate, then this bequest shall be void."

The Bulah Melvin mentioned in the foregoing clause of Maria Beebe's will is the Beulah E. Melvin mentioned in these proceedings. On August 2, 1909, the executor presented a petition for the final settlement of his accounts, returnable September 6, 1909, in and by which it appears that he cites Beulah E. Melvin as claimant against the estate of Cyrus Beebe, deceased. On

the return day of said citation, it developed that Beulah E. Melvin had presented a claim against the Cyrus Beebe estate for \$1,000, crediting thereon the \$600 mentioned in the legacy given her by the will of Maria Beebe, deceased; but that the claim had been rejected and that no further steps were taken by the said Beulah E. Melvin to enforce its collection or to comply with the statutes with reference thereto. The executor urges that, she having failed to offer to refer the claim or bring an action on it within six months after its rejection by him, under section 1822 of the Code of Civil Procedure, which is a short Statute of Limitations, she is barred from any further remedy to present or collect the same. The said Beulah E. Melvin, at the time of the presentment of the claim and its rejection, was an infant under the age of twenty-one years and is still an infant; she has no general guardian and it is conceded that no further steps were taken for the enforcement of the claim after the rejection of it as aforesaid by the executor. The claim arose, according to the agreement of the special guardian made on the return day of the citation, which was the time of his appointment, as follows:

Mr. and Mrs. Beebe were old people and they agreed with the infant, and with her father, that, if she would come and live with them until the survivor of them passed away, Mr. Beebe would give her \$1,000, to be paid her at the time of the decease of the survivor of them and as much more as he chose to give her.

It was further claimed that there was evidence in existence that would substantiate this claim.

In order that the court might be advised as to whether this infant had rights beyond what appeared upon the argument, and whether there was evidence to protect those rights, a referee was appointed, upon the consent of all parties present, to take such evidence as might be had of the validity and existence of such a claim and their consent that the question, as to whether she

is barred by the provisions of section 1822 of the Code of Civil procedure, be decided on the coming in of the report of the referee.

It will be noticed that paragraph nine of the will of Maria Beebe undertakes to pay whatever was due this infant from her husband with this legacy in her will; and she provides that, if the said infant or her representatives shall in any way try to recover any sum for her services from her husband's estate, the bequests in her, Maria Beebe's will, shall be void. It therefore would seem that, when the settlement of the estate of Maria Beebe, deceased, comes before this court, the executor of her will, who is the same executor accounting here, may then and might be bound to raise the question that, by filing the claim against the estate of Cyrus Beebe, the husband, she had forfeited her right to such legacy.

The special guardian urges that the Statute of Limitations, as found in chapter 4, title 3 of the Code of Civil Procedure, relieves her from the harsh remedy that would prevail in the case of an adult under section 1822 of the Code of Civil Procedure. The attorney for the petitioner urges that subdivision 1 of section 414 of chapter 4, title 3, of the Code of Civil Procedure, exempts from the provisions of that chapter said section 1822 and that said chapter applies only to actions designated therein arising under circumstances therein provided.

That that rule is not so held, universally, will be seen by an examination of *Hayden v. Pierce*, 144 N. Y. 512; *Wetyen v. Fick*, 178 id. 223, and cases where other short statutes have been prescribed. See *Connolly v. Hyams*, 176 N. Y. 404.

It is a general proposition of law that this court has no jurisdiction of an infant until a citation has been served upon her. A minor and her appearance in this court is provided for in section 2530 of the Code of Civil Procedure.

An infant may file a petition in Surrogate's Court, but she cannot proceed thereon until a special guardian has been ap-

pointed for her, unless she appears by a general guardian. She cannot bring an action to enforce any right she may have without being represented by a guardian appointed or authorized by a court to appear for her. Shall the provisions of section 1822 be construed as an exception to the well-known rule with reference to infants? We think not. We do not think the serving of a rejection upon this infant affected her rights any more than if a summons and complaint had been served upon her and she had not appeared and a judgment had been entered up against her without the appointment of a guardian ad litem to take care of her interests. While we do not decide here that the evidence taken by the referee as aforesaid and presented to this court establishes her claim, we do say that, unexplained, *prima facie*, it shows that there was some foundation for the position she has taken. And, if she has a valid claim for \$1,000 against the estate of Cyrus Beebe, deceased, the court will be far amiss in doing its duty to permit Maria Beebe, his wife, to pay it with the \$600 legacy in her will and compel her, if she refused to accept that, to lose her compensation for the labor she rendered these old people.

It is conceded by the petitioner that she worked for them a year and eleven months and rendered faithful service. I decline to hold that she shall be robbed of even a part of her just compensation for such services by construing section 1822 of the Code of Civil Procedure so that its terms will contravene all other statutes in that regard. There was no waiver of her right to that claim, because, as an infant, she could not do anything that would constitute a waiver.

Let an order be drawn holding that the provision of this section does not apply to her failure to bring an action after the rejection of this claim; that through her special guardian she has a right to present that claim to the executor and, in the event of its rejection, her special guardian is entitled to take any remedy in this court that an adult could take to prove its validity

and enforce its collection, if found valid. After said order is signed and entered, let a copy thereof be served upon the executor-petitioner and upon his attorney and said proceedings be then adjourned for seventy days to permit an appeal therefrom, if the executor shall be so advised.

Decreed accordingly.

In the Matter of the Estate of CAROLINE M. KISSEL.

(Surrogate's Court, New York County, December, 1909.)

TAXES—INHERITANCE AND TRANSFER TAX—PROPERTY AND INTEREST SUBJECT TO TAX—PROPERTY PASSING UNDER POWER OF APPOINTMENT.

The transfer of such property as is located in this State, only, is taxable where such transfer is effected by the exercise by a resident of the State of New Jersey of a power of appointment created under the will of a resident of this State who died in 1886.

Appeal from an order fixing tax in the estate of Caroline M. Kissel.

Lewis E. Carr, Jr., for comptroller; Lord, Day & Lord, for executors.

COHALAN, S.—The decedent was a resident of New Jersey. Her will was proved in that State, and the executors of her estate were duly appointed by the courts of that State. David P. Morgan, the father of decedent, died in 1886, a resident of New York county. Under his will a power of appointment over a certain trust fund was given to the decedent, Caroline M. Kissel. She exercised the power in favor of her husband and other beneficiaries of the class limited by the provisions of the will creating the power. The securities constituting the trust fund were located in New Jersey at the date of decedent's death. They consisted of bonds and stock of foreign and domestic corpora-

tions. The appraiser designated to appraise the estate of the decedent for the purposes of the Transfer Tax Act included in his appraisal of the assets of the estate all the securities constituting the trust over which the decedent had the power of appointment. The executors appeal upon the ground that the only part of the trust fund taxable in this proceeding is that portion of it invested in stocks of domestic corporations. As David P. Morgan, the grantor of the power, died in 1886, and limited the disposition of his estate to beneficiaries of the one per cent. class, the trust fund above referred to was not taxable under the law as it existed at that time. Laws of 1885, ch. 483, § 1. Therefore, the State of New York had no lien upon the property, and the trustees had the right to remove it out of the State or to invest it in the securities of foreign corporations. The exercise of a power of appointment was first made taxable by subdivision 5 of section 220 of the Transfer Tax Act of 1897. Prior to the passage of that act, property passing by virtue of a power of appointment was not taxable, unless it would be taxable if transferred directly from the grantor of the power of appointment under the power. *Matter of Harbeck*, 161 N. Y. 211. If the property passed directly from David P. Morgan to the beneficiaries mentioned in the will of the decedent herein, no tax whatever would accrue to the State of New York. It is the transfer of property effected by the exercise of the power of appointment that is taxable, and it is the exercise of the power and not its creation which effects the taxable transfer. *Matter of Howe*, 86 App. Div. 286. As was said in *Matter of Dows*, 167 N. Y. 227: "Whatever may be the technical source of title of a grantee under the power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it." For the purpose of the Transfer Tax Law the execution of the power is deemed the source of title of the appointees. *Chanler v. Kelsey*, 205 U. S. 466; *Matter of Delano*, 176 N. Y. 486. The basis of the power to tax is the fact of actual dominion over the subject

of taxation at the time the tax is to be imposed (*Matter of Swift*, 137 N. Y. 77), but the subject of taxation may be either property of a tangible nature or a privilege conferred by statute. *Matter of Hull*, 111 App. Div. 322. Therefore, the right of the State to tax is limited to where it has actual dominion or jurisdiction over the property transferred, or of such privilege; and an instance or example of such privilege is the permission granted by the State to the appointee under a power of appointment to take property by virtue of the exercise of the power. The State says that as a condition of permitting the exercise of a power of appointment it shall be deemed a transfer, taxable under the provisions of the Transfer Tax Act, in the same manner as if the property to which such appointment relates belonged absolutely to the donee of the power. Transfer Tax Act, § 220, subd. 5. But, as the power of appointment given to the decedent herein was exercised by her while a resident of the State of New Jersey, and was consummated by the probate of her will under the laws of the State of New Jersey, the general privilege of permitting all the property included within the power to pass to the beneficiaries appointed by the decedent was a privilege granted by the State of New Jersey and not by the State of New York. The only privilege granted by the State of New York was to permit the transfer of the property located in New York to pass to the appointees in accordance with the provisions of the will probated in New Jersey. Therefore, the jurisdiction of the State of New York to tax the transfer of property passing under the will of the decedent is limited to the property situated in this State at the time of her death. *Matter of Hull*, 111 App. Div. 322; *affd.*, 186 N. Y. 586; *Matter of Howe*, 86 App. Div. 286; *affd.*, 176 N. Y. 570; *Matter of Dows*, 167 *id.* 227. The order fixing tax should be reversed and the report of the appraiser remitted to him for the purpose of excluding from his appraisal all stocks of foreign corporations and all bonds located outside of the State at the date of decedent's death.

Decreed accordingly.

**Matter of the Assessment of the Transfer Tax Against the Estate
of JOHN KLINE, Deceased.**

(Surrogate's Court, Oswego County, December, 1909.)

**GIFTS—IN GENERAL—PARTICULAR INSTANCES—BANK DEPOSITS IN JOINT
NAMES OF DONOR AND DONEE.**

**HUSBAND AND WIFE—PROPERTY OWNED JOINTLY OR IN COMMON—JOINT DE-
POSIT IN BANK.**

**TAXES—INHERITANCE AND TRANSFER TAXES—PROPERTY AND INTEREST SUB-
JECT TO TAX—DEPOSIT IN BANK—TO CREDIT OF HUSBAND AND WIFE
JOINTLY.**

The deposit by husband and wife of moneys belonging to each to their joint credit in a savings bank does not indicate a gift *inter vivos*, but an intention that, on the death of either, the funds belonging to the one dying shall pass to the survivor; and, upon the death of either, the transfer of that part of the deposit so passing to the survivor is taxable.

Appeal from an order entered upon the report of an appraiser fixing the transfer tax upon the estate of a deceased person.

W. B. Baker, for State Comptroller; Ira P. Betts, for Mary Kline, administratrix of the estate of John Kline, deceased.

MILLER, S.—John Kline died in the town of Schroepfel, N. Y., on the 29th day of December, 1907. At the time of his death there were on deposit in three banks in the city of Syracuse, N. Y., in the joint names of himself and his wife, Mary Kline, deposits aggregating something over \$9,000. In each bank the account was payable to either or the survivor. It appears from the evidence that a part of the money belonged to the wife individually, when deposited, but the exact amount does not appear. The widow, who is also the administratrix of the estate, contends that the act of her husband in placing the money in the different banks in the manner above stated imported a gift to her at

the time the different deposits were made, and that no part of the same is liable to a transfer tax.

I am of the opinion that such portions of the different accounts as were not the moneys of Mary Kline when deposited are taxable. I am not unmindful of the fact that, under the decisions, where a husband deposits his money in a savings bank in his name and that of his wife with the account payable to either or the survivor, as was the case here, she has such an interest in the deposit as gives her the equal right with him to draw it during their joint lives, and vests her with the absolute title in case she survives him. *Moore v. Fingar*, 131 App. Div. 399.

The widow and a daughter testified before the appraiser that the deceased frequently said that it was his intention that the money should belong to his wife, if she survived him.

Judge Vann, writing a concurring opinion in *Augsburg v. Shurtliff*, 180 N. Y. 146, lays down the proposition that the fact that a savings bank account was several in form, so that either could draw during the lifetime of both, clearly indicates that a gift inter vivos was not intended. It seems necessary that, to constitute a valid gift of personal property, there must be on the part of the donor an intent to give, and a delivery, in pursuance of such an intent, of the thing given to or for the donee. The delivery, however, whether actual or constructive, must be such as will operate to divest the donor of possession of and dominion over the subject of the gift. *Beaver v. Beaver*, 117 N. Y. 421.

It seems to me, from the evidence in this proceeding, it was not the intention of either party to divest himself or herself of the control and use of the money so long as both lived, and that the accounts were entered in the way we find them, so that either could draw money during their joint lives as a matter of convenience, and, upon the death of either, the deposits would become the absolute property of the survivor.

While this question has never been directly passed upon, so far as I have been able to ascertain, yet the Appellate Division

in this department has held that, if a savings bank deposit is a mere tentative trust, revocable by the deceased, the depositor, during his lifetime, it is taxable, although the trust becomes absolute and irrevocable upon the death of the depositor. *Matter of Pierce*, 132 App. Div. 465, following *Matter of Totten*, 179 N. Y. 125.

While in the case at bar it would seem that the wife could have drawn every dollar of this money during the joint lives of herself and her husband (*Moore v. Fingar*, 131 App. Div. 399), yet her title to the deposits was not so perfect but that the husband could have revoked the gift at any time during his lifetime by drawing the money himself. So that it can hardly be urged that the deceased surrendered the absolute possession and dominion over the money in question during his lifetime.

While I do not think there was the slightest intention on the part of the parties to this transaction to avoid the provisions of the Transfer Tax Law, yet, if the principle contended for by the administratrix in this case should be established, it certainly would provide a simple and effective way to evade the plain provisions of the statute.

It follows that the transfer not having become absolute until the death of the depositor, such parts of the different deposits as were not the moneys of Mary Kline when deposited are taxable. Consol. Laws, ch. 60, § 220, subd. 4.

I am unable to ascertain from the evidence the exact amount of money that belonged to Mary Kline when deposited, or the accrued interest thereon.

An order may be entered remitting the matter to the appraiser for further evidence upon this point; and, upon the return of the same, the tax will be assessed in accordance with the views herein expressed.

Decreed accordingly.

Matter of the Intermediate Account of CLARENCE G. CARR, as
 Executor of and Trustee Under the Last Will and Testament
 of JOHN T. CARR, Deceased.

(Surrogate's Court, Saratoga County, January, 1910.)

ESTOPPEL—EQUITABLE ESTOPPEL AND ESTOPPEL IN FAIS—FACTS CREATING ESTOPPELS—ACQUIESCENCE—CONSENTS AND PERMISSIONS.

TRUSTS: THE TRUSTEE, APPOINTMENT, QUALIFICATION, RESIGNATION AND REMOVAL—BONDS AND OBLIGATIONS—BOND OF TESTAMENTARY TRUSTEE—WHEN TO BE REQUIRED: EXECUTION AND ADMINISTRATION OF TRUST—INVESTMENTS—ASSENT OF BENEFICIARY.

Where, pending a hearing upon a proceeding for the judicial settlement of the accounts of an executor and trustee, it was agreed by the parties in interest that the executor and trustee who was a non-resident might continue investing in foreign real estate and that he might hold certain bank stock for five years from the date of the agreement, the beneficiary of the trust fund who at that time received an advancement is bound by the agreement and is thereby estopped from urging objections to the account that the investments in the foreign real estate were improper and illegal and that the executor and trustee should be charged with the market value of the bank stock instead of its par.

Where a will contains no express provision that said executor and trustee may act without security, but no objection was made to the granting of letters testamentary on the ground of his non-residence, he may, under sections 2638 and 2815 of the Code of Civil Procedure, as testamentary trustee, be required to file security in a case where as executor he could not be removed for failure to give it.

But where the executor as trustee has not possession of the share of the estate bequeathed to him as trustee until after the death of the life tenant, he should not be required to give security until the trust fund comes to him as trustee after the entry of a decree settling his accounts as executor and directing payment of legacies.

Proceeding upon the account of an executor and trustee.

Rockwood, McKnight & McKelvey, for Lora W. C. Lowe;
 Slade, Harrington & Goldsmith, for Clarence G. Carr.

OSTRANDER, S.—John T. Carr died August 25, 1899. His will was probated September 17, 1889, and letters testamentary were issued to Clarence G. Carr. A decree settling his account was made September 8, 1897.

February 18, 1901, Lora W. C. Lowe filed a petition to require said executor to render a further account of his proceedings as executor and trustee under said will; and, on December 10, 1901, he filed such account, which was settled on that date.

June 12, 1905, said executor filed his petition for a voluntary intermediate judicial settlement of his account, and therewith filed his account, to which said Lora W. C. Lowe filed objections.

Pending the hearing upon this proceeding, an agreement was entered into between said Clarence G. Carr, Antoinette S. Carr, Carrie Carr and Lora W. C. Lowe, that Clarence G. Carr pay to Lora W. C. Lowe \$3,500 out of the trust fund, as an advancement to her, which, together with interest thereon at four per cent. per annum, should be taken from any sum thereafter due her; and that no objection would be made by any one to this payment before it fell due to her, or to its possible invalidity; and that said Lora W. C. Lowe would not ask for further advancements during the life of said Antoinette S. Carr; and she assigned to said Clarence G. Carr all her interest in said trust fund as collateral for repayment of said \$3,500 and interest, and among other things agreed "that she will not interfere with the future management of said estate or ask for legal accountings, provided that her rights in the same are not jeopardized in fact, and a sworn statement and accounting of the estate is made to her in the month of January of each year."

It was also agreed that said executor and trustee might continue to invest the funds of the estate when necessary in first mortgages on improved real estate in Minneapolis, Minn., and elsewhere, the same as was done by said John T. Carr in his

lifetime and has been done subsequently by said Clarence G. Carr, and that he might hold for five years from date (July 20, 1905) stock of the First National Bank.

October 5, 1905, a decree was entered settling the account of the executor, showing a balance in the hands of said executor of \$30,322.99, "to be by him and the said Antoinette S. Carr, the widow, and the said Clarence G. Carr, as trustee of Lora W. C. Lowe under the terms of the will, managed, invested and controlled according to the terms of said will."

On August 12, 1909, Lora W. C. Lowe filed her petition to compel said Clarence G. Carr to render and settle his account as executor and trustee.

October 9, 1909, said Clarence G. Carr filed his account as such executor and trustee. October 12, 1909, Lora W. C. Lowe filed unverified objections to said executor's account of his proceedings as executor and trustee, etc., and claimed:

First. That the "executor" should be charged personally with three mortgages aggregating \$2,400 upon property in Minnesota, unless such investments were made prior to mailing verified statement January 25, 1906, to her attorneys, for the reason that the investments were on property outside New York State and not legal investments under New York laws.

Second. That the mortgages should be converted into cash and invested in securities under New York laws.

Third. That the executor should be charged market values instead of par value of First National Bank stock.

Fourth. That the executor should be charged with interest on \$2,031.50, cash on hand, and required to invest it.

October 12, 1909, Lora W. C. Lowe filed her petition, alleging herself interested in said estate and that Clarence G. Carr is the acting executor and trustee under said will, and has been such for many years, and is not a resident of this State, but resides at Minneapolis, and has no office in this State, and that the will contains no express provision to the effect that Clarence G.

Carr may act as executor and trustee without giving security; that he has \$13,709.51 in personal property (besides thirty-five shares First National Bank stock) all outside New York State, and prays that he be compelled to give security.

From the evidence it appears that Clarence G. Carr has resided in Minneapolis since 1882 and keeps the personalty there; that he rendered a sworn account or statement of the estate to Mrs. Lowe by sending same to her attorneys in January, 1906, but had not furnished any account since then, because the attorneys had informed him, in February, 1906, that they did not know her address, but would furnish it to him, and had never done so, and that he did not know her address; that all the securities on hand were on hand at the former accounting; that of the inventory \$10,000 was real estate in Saratoga Springs; that the executor owned several pieces of improved realty in Minneapolis and was personally responsible; that of the estate under the will after death of Antoinette S. Carr, his mother, executor was entitled to one-third individually; Caroline Carr to one-third and Clarence G. Carr as trustee for Mrs. Lowe one-third, subject to deduction of \$3,500 under the agreement.

After giving a legacy of \$1,500 to Caroline Carr, the will gives to Antoinette S. Carr, widow, use of all the remainder during her life in lieu of dower, and then proceeds: "Third, I give, devise and bequeath all the rest, residue and remainder of my estate *after such use as aforesaid by my said wife and at her death as follows:*" one-third to Clarence G. Carr, one-third to Caroline Carr, and one-third to Clarence G. Carr as trustee for Lora W. C. Lowe, and others.

Accountant urges that, by the agreement of 1905, wherein Mrs. Lowe agreed not to interfere with the future management of the estate or ask for accountings unless her rights were in fact jeopardized, she is barred from taking this proceeding. But this was upon condition that he render to her a verified statement and accounting of the estate in January of each year. This he

has not done since 1906, and he assigns as a reason that he did not know her address and that she made no demand upon him for it. He has not stood upon this contention, but has filed his account pursuant to the prayer of her petition, and it is not necessary to pass upon this contention.

The objection that the mortgages on Minneapolis property were improper investments, because on property without the State, and the objection as to the Citizens' Bank stock which is held by the executor, are met by the agreement of 1905, in which contestant expressly agreed that such investments might be made and that such bank stock might be held until July 20, 1910. The condition for annual statements attached to the clause of the contract providing that Mrs. Lowe would not call for accountings if statements were rendered her does not affect the other clauses of the contract (*Bogardus v. New York Life Insurance Co.*, 191 N. Y. 328-335); and, as to the other provisions, said contract stands, and the contestant is bound and estopped by it from urging these objections to the account.

As to the objection that the executor should be charged interest on the \$2,031.50 cash on hand, there is no evidence as to when he came by it, nor anything showing any neglect to reasonably invest it. I think the objection to the account should be overruled.

We come then to the question whether security shall be required of Mr. Carr. He was a nonresident of the State when letters testamentary were granted to him in 1889, and no objection was made on the ground of nonresidence until this time. He appears to be financially responsible, and no disqualification is shown against him, unless it be his nonresidence. This application is not to remove the executor, as contemplated by section 2685 of the Code of Civil Procedure; but, if it were, under the doctrine of *Postley v. Cheyne*, 4 Dem. 492, the facts would not warrant his removal under that section in default of security.

But this application is made under section 2815, Code of Civil Procedure, which provides that a person interested in the execution of a trust may present to the court any fact respecting a testamentary trustee "the existence of which, if it was interposed as an objection to granting letters testamentary to a person named as executor in a will, would make it necessary for him to give security in order to entitle himself to letters," and pray for a decree requiring the trustee to give security, etc. Under section 2638 a person named as executor against whom there is an objection of nonresidence may entitle himself to letters by giving a bond, etc. Under these provisions a testamentary trustee may be required to file security in a case where an executor could not be removed for failure to give it.

But, under the will in this case, the legatee Carr, as trustee, has no possession of the share of the estate bequeathed to him as trustee, until after the death of his mother. There has been no separation of the estate for the purpose of these legacies. It is all in the hands of Carr as executor, and there has never been any receipt of it by him as trustee and cannot be until the death of Mrs. Carr. When a decree shall be made settling his account as executor and directing payment of the legacies, a petition may be properly made requiring him to give security for the amount to come into his hands as trustee; but, until the trust fund comes to his hands as trustee, I do not think he should be required to give security for it, in view of the burden which would be imposed upon the fund in carrying such a bond for perhaps several years before receipt of the fund by him, and in view of the fact that no disqualification or irresponsibility is shown.

The objections to the account should be overruled, and the prayer of the petition for security should be denied.

Decreed accordingly.

Matter of the Appraisal of the Estate of MARY R. MOORE, Deceased, Under the Act Relative to Taxable Transfers of Property.

(*Surrogate's Court, Saratoga County, January, 1910.*)

TAXES—INHERITANCE AND TRANSFER TAXES—EXEMPTIONS—HOSPITALS; BENEVOLENT ASSOCIATIONS.

Although the services of patients at the Craig Colony for Epileptics are utilized upon its lands to grow foods, or to make products which may be sold by the State and the proceeds used to purchase necessities for the support of the colony, it is, nevertheless, within the meaning of section 221 of the Tax Law, conducted "exclusively" for the charitable and other purposes specified in the section; and a legacy to it is exempt from transfer tax.

The Woman's Christian Temperance Union of Ballston Spa, N. Y., is also within the language of said section, and a legacy to it is likewise exempt.

See 145 App. Div. 712.

Appeal from an order of the Surrogate's Court of Saratoga county, made upon the report of the county treasurer, fixing the amount of a tax upon certain legacies.

John H. Burke, for executors; Burton D. Esmond, for comptroller.

OSTRANDER, S.—This is an appeal from an order of the Surrogate's Court of Saratoga county, made upon the report of the county treasurer, fixing the value of certain legacies under the will of deceased and the amount of tax payable thereon, pursuant to article 10 of the Tax Law. Said order was made June 15, 1909; and the portion thereof appealed from is that part which adjudges a tax to be payable upon legacies bequeathed in the will of deceased to Craig Colony for Epileptics and to the Woman's Christian Temperance Union of Ballston Spa. The

sole question urged upon this appeal is whether such legacies are taxable or exempt under section 221 of the Tax Law.

Mary R. Moore died December 15, 1908, leaving a will which was probated March 20, 1909.

By article 36 of her will testatrix gave to the board of managers of the Craig Colony for Epileptics \$20,000 in trust "to be invested by said board and forever kept invested in such securities as said board may deem proper, the interest and income arising therefrom to be used and applied to the uses, purposes and objects of said colony;" and by the residuary clause of said will said board of managers of said colony was given one-fourth of her residuary estate upon the like trust and for like objects.

By the 38th clause of her will deceased gave \$1,000 to the Woman's Christian Temperance Union of Ballston Spa, N. Y., in trust to keep the same invested and to use the income for the benefit, support and maintenance of said union.

It is conceded that those legacies are taxable, unless they are exempt under the provisions of section 221 of the Tax Law.

That section, so far as applicable to this case, provides that "any property devised or bequeathed to any person who is a bishop, or to any religious, educational, charitable, missionary, benevolent, hospital or infirmary corporation, including corporations organized exclusively for bible or tract purposes, shall be exempted from and not subject to the provisions of this article. * * * But no such corporation or association shall be entitled to such exemption if any officer, member or employee thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operation thereof, except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association, or for any of its members or employees, or if it be not in good faith

organized or conducted exclusively for one or more of such purposes."

It is not seriously urged that the Craig Colony is maintained as a pretended charitable institution, for the purpose of making profits and evading the Tax Law; nor that any officer, member or employee thereof received any pecuniary profit, except reasonable compensation for services in effecting its purposes. And we come to the question, Is the Craig Colony an "educational," "charitable," "benevolent," "hospital" or "infirmary" corporation; and, if so, is it organized or conducted exclusively for one or more of such purposes?

Craig Colony was organized under a special act—chapter 363, Laws of 1894. It has been continued under chapter 546, Laws of 1896, and the State Charities Law, chapter 55, Consolidated Laws. The objects of the colony, as stated in the statute, are "to secure the humane, curative, scientific and economical treatment and cure of epileptics, exclusive of insane epileptics;" and in furtherance of this design the statute provides for the furnishing of land, buildings for dwellings, for an infirmary, school house, chapel, workshops for the teaching and productive prosecution of trades and industries.

It is contended by the comptroller that, because means are to be provided for productive prosecutions of trades and industries, and because it is elsewhere (§§ 10, 11) declared that the intent of the act is that the colony shall be self-supporting as far as possible, the language indicates that the colony was not organized exclusively for one or more of the purposes, educational, charitable, benevolent, hospital or infirmary, which would entitle the legacy to exemption, but in part for profit. This contention does not seem well founded. The exclusive object is to secure treatment and care of a class of unfortunates, and, incidental to such care, is provision for such productive use of their labor as will serve to bear a part of the expense. That the object of the

colony is not gain is evident from the further provisions of the acts creating it.

All its property is owned by the State. The board of managers are appointed by the governor and confirmed by the Senate, and serve without compensation. They are authorized to receive and hold, "in trust for the State," property to be applied to the maintenance and education of epileptics and the general uses of the colony. The treasurer is required to deposit all moneys of the colony under direction of the comptroller, and to account monthly to him. Different classes of patients are received.

(a) State patients, epileptics resident in the State who are unable to provide for their support in the colony.

(b) Private patients, who are received for such compensation as the managers deem just, in case they can be accommodated.

(c) State patients, received upon application of local poor authorities, whose duty it is made to place epileptics coming under their charge in the colony.

All State patients are gratuitously supported by the State, except that the counties from which State patients are received are required to pay thirty dollars per year for clothing for each patient.

In the reception of patients, preference is required to be given to indigent patients, after them to patients able to pay only in part, and after them to patients able to pay in full the expense of their maintenance.

In case the number of applicants for admission as State patients exceeds the accommodations, admission is apportioned among the counties according to their dependent epileptic population. Annual reports to the State board of charities are required to be made, and the State board is required to certify to the Legislature what appropriations are necessary for the support of the institution.

Briefly, the scheme of the colony is to secure treatment of sane epileptics; by employing them to make them, as nearly as possible, self-supporting, and for the balance of the expense to call upon the State treasury. Donations in aid of this object are received; and, so far as there may be accommodations after caring for indigent patients, other patients are treated at the cost of such service.

The fact that the services of patients are utilized upon its lands to grow foods, or to make products which may be sold by the State and the proceeds used to purchase necessities for the support of the colony, does not prevent the organization or conduct of the colony from being exclusively charitable, educational, benevolent, if its lawful operations and objects bring it within those descriptions.

Charitable, in its usual and ordinary sense, means pertaining to almsgiving or relief of the poor, springing from charity, or intended for charity. Cent. Dict. In a legal sense charity has been defined as a gift to be applied lawfully, among other things, for the benefit of an indefinite number of persons, by bringing their hearts under the influence of education or religion, relieving their bodies from disease or suffering. See "Charity," as defined in "Words and Phrases."

The Craig Colony's objects, conduct and organization are aptly described in the remark of Judge Haight relative to the Vassar Brothers Home for Aged Men, 127 N. Y. 1 (14): "It possessed no element of private or corporate gain, and whatever income it may derive is devoted to the charity for which it was incorporated."

In *People ex rel. N. Y. Institute for Blind v. Fitch*, 154 N. Y. 14, Judge Martin said, at page 33: "The relator must be regarded as a charitable institution so far as it clothes, educates, and maintains indigent pupils at public expense or by donations from individuals. So far as it educates pupils who pay for their tuition, board and maintenance it is not to be regarded as a charitable but only as an educational institution."

Craig Colony under its charter duties performs acts, charitable, educational, benevolent, hospital and infirmary in their nature; and its energies are directed exclusively to such acts.

Within the foregoing authorities and the authority of *Corbett v. St. Vincent Industrial School*, 79 App. Div. 334; *affd.*, 177 N. Y. 16; *Smith v. Havens Relief Fund Society*, 44 Misc. Rep. 594, 118 App. Div. 678; *Matter of Shattuck*, 193 N. Y. 446, 452; and following the holding of Judge O'Brien in *People ex rel. Board of Charities v. N. Y. Society Prevention Cruelty Children*, 162 N. Y. 429, 431, that a charitable institution subject to visitation by the State board of charities "must be one that in some form or to some extent receives public money for the support and maintenance of indigent persons," I feel no hesitation in holding Craig Colony to be such a corporation that legacies to it are exempt from the transfer tax under the provisions of section 221 of the Tax Law.

While it is not necessary in reaching this conclusion to refer to other legislation, it is significant that the Legislature, in making appropriations, has classed this corporation and appropriated moneys for it, as a "charitable institution." Laws of 1903, ch. 599; Laws of 1904, ch. 729; Laws of 1905, ch. 700; Laws of 1906, ch. 686; Laws of 1907, ch. 578; Laws of 1908, chs. 466, 469.

I do not think the Legislature ever intended to tax benevolently inclined people for the privilege of making legacies designed to relieve the State of its burdens. No more effectual way of stopping such benevolence could be well devised. While the courts have no power to prevent the Legislature from establishing such a greedy and foolish policy, they should not by construction impute such an intention in cases where it does not clearly appear, nor, by hair-splitting constructions of the statute, entrap unwary persons who desire to limit their benefactions to the State by the amount set out in the legacy. So much of the

order appealed from as imposes a tax upon the gifts to the Craig Colony should be reversed.

The Woman's Christian Temperance Union is incorporated and its certificate of incorporation states the purposes of its incorporation to be "to promote Christian temperance work and the uplifting of the youth in the community." The affidavit of its president says that its work has been to discourage the use and traffic of liquor, the use of tobacco, cigarettes, opium and morphine, and to give special attention to evangelistic work; that it arranges religious services at places where no meetings are otherwise held, such as the county almshouse and county jail; that the society depends entirely on charity for its support, and its officers receive no compensation for their services. I think this society falls within the class of benevolent, educational, charitable corporations, intended to be exempted from payment of the transfer tax under section 221 of the Tax Law (*Matter of Moses*, 60 Misc. Rep. 637); and the order imposing a tax upon this legacy should be reversed.

Decreed accordingly.

Matter of the Application of CHARLES S. POOL, for an Intermediate Accounting of the Estate of SOPHIE S. POOL, Deceased.

(*Surrogate's Court, Westchester County, January, 1910.*)

INSURANCE—ASSIGNMENT OR TRANSFER OF POLICY—RIGHT TO MAKE ASSIGNMENT—ASSIGNMENT BY WIFE OF POLICY ON HER HUSBAND'S LIFE IN HER FAVOR—DISPOSAL BY WILL ON DEATH BEFORE HUSBAND.

Where, by a decision of the Appellate Division, it is determined that a testator's executor was not entitled to receive the proceeds of an insurance policy upon the life of testator which had been issued for the sole benefit of his wife who predeceased him, but that the policy passed to her executor as part of her estate; and, where the wife left descendants, her attempted disposition of the policy by her last will

and testament was ineffectual for any purpose and the proceeds should be administered as unbequeathed assets, as, under section 22 of the Domestic Relations Law (Consolidated Laws, ch. 19, sec. 52), the right of a married woman to dispose of such a policy is now dependent upon her dying "leaving no descendants surviving."

Proceedings upon intermediate account of an administrator *cum testamento annexo*.

L. T. Flatto, for petitioner; W. B. & G. F. Chamberlain, for administrator *cum testamento annexo*.

MILLARD, S.—Charles S. Pool, a son of Sophie S. Pool, deceased, made and filed a petition setting forth the following facts:

That in 1863 a policy of life insurance was issued by the New England Mutual Life Insurance Company upon the life of John H. Pool, for the sole benefit of Sophie S. Pool; that Sophie S. Pool, wife of said John H. Pool, died domiciled at Harrison, Westchester county, State of New York, on or about the 14th day of June, 1901, leaving a last will and testament which was executed on the 20th day of September, 1900, and duly admitted to probate, wherein she named her husband, said John H. Pool, as her executor and also her sole legatee and devisee; and letters testamentary were thereafter duly issued to the said John H. Pool by the surrogate of Westchester county; that at the time of her death she left her surviving her husband and her five children, of whom the petitioner is one; that thereafter, and on or about the 27th day of January, 1907, the said John H. Pool died, leaving a last will and testament under and by virtue of which his wife, Sophie S. Pool, his son J. Lawrence Pool and one William H. Macy, Jr., were named as executors; that said Sophie S. Pool having predeceased said John H. Pool and the said William H. Macy, Jr., having renounced his appointment as executor, letters testamentary were duly issued to said J.

Lawrence Pool, and the said J. Lawrence Pool is the sole acting executor of the estate of John H. Pool; that no special bequest was made by the said John H. Pool of the policy in question in his said last will and testament; that Sophie S. Pool, the beneficiary named in the policy, was a married woman and always resided with her husband during coverture; that she was never engaged in business and whatever debts she left had been paid, as well as her funeral and testamentary expenses; that, although John H. Pool qualified as executor of the estate of Sophie S. Pool shortly after her death on the 14th day of June, 1901, no account or report was ever made by him or by his successor, J. Lawrence Pool, who was duly appointed administrator with the will annexed of the estate of Sophie S. Pool by this court, on or about the 30th day of January, 1908; that the administrator with the will annexed of the estate of Sophie S. Pool claims the petitioner has no interest in this estate and, therefore, his petition for a compulsory accounting cannot be granted; while the petitioner claims that the said Sophie S. Pool died intestate as to the proceeds of this policy and that he, being one of her next of kin, namely, one of five children, is entitled to one-fifth thereof.

The question of this policy of insurance has already been before the Appellate Division of this district in an action brought by J. Lawrence Pool, as executor of John H. Pool, deceased, against the New England Mutual Life Insurance Company (123 App. Div. 885); and the court there held that the plaintiff, as executor of John H. Pool, was not entitled to receive the proceeds of the policy, but that, upon the death of the insured, the insurance moneys passed to the executor of the estate of Sophie S. Pool, as her representative and as part of her personal estate.

My attention has been called to section 22 of chapter 272 of the Laws of 1896, known as the Domestic Relations Law, where the statutes relating to the ability of a married woman to assign

policies were repealed and this section enacted, which provides as follows:

"§ 22. Insurance of husband's life.—A married woman may, in her own name, or in the name of a third person, with his consent, as her trustee, cause the life of her husband to be insured for a definite period, or for the term of his natural life. Where a married woman survives such period or term she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property, and free from the claim of a creditor or representative of her husband, except that where the premium actually paid annually out of the husband's property exceeds five hundred dollars, that portion of the insurance money which is purchased by excess of premium above five hundred dollars is primarily liable for the husband's debt. The policy may provide that the insurance, if the married woman dies before it becomes due and without disposing of it, shall be paid to her husband or to his, her or their children, or to or for the use of one or more of those persons; and it may designate one or more trustees for a child or children to receive and manage such money until such child or children attain full age. The married woman may dispose of such policy by will or written acknowledged assignment to take effect on her death, if she dies thereafter leaving no descendants surviving. After the will or assignment takes effect, the legatee or assignee takes such policy absolutely."

"A policy of insurance on the life of any person for the benefit of a married woman is also assignable and may be surrendered to the company issuing the same, by her, or her legal representatives with the written consent of the assured."

Judge Woodward, in a dissenting opinion in the case above referred to, applying to this very policy, said (123 App. Div. 892): "It is to be noted, however, that the right of a married woman to dispose of a policy like the one now under consideration by will is now dependent upon her dying 'leaving no

descendant surviving.' Mrs. Pool died leaving five children, consequently the disposition or attempted disposition by her last will and testament must be deemed void and ineffectual for any purpose."

I believe that this is the true construction to be given to the section above quoted and that this policy could not be willed by Mrs. Pool, and that, therefore, the proceeds of the policy became unbequeathed assets in the hands of her administrator.

I think that the majority opinion of the court is in entire accord with this same view and that, when they say, on page 887 of the same case, "I think that upon the death of the insured the insurance moneys passed to the executor of the estate of Sophie S. Pool as her representative and as part of her personal estate," they do not mean the money to be disposed of in accordance with the provisions of her will, but that it should be disposed of by the said executor, who is the only legal representative there can be (it not being possible to have both a living executor and administrator in office at the same time administering the same estate) and that he should administer the same as unbequeathed assets of the estate of Sophie S. Pool, in which assets the petitioner is entitled to a one-fifth share.

I, therefore, grant the application and direct that a citation issue to compel an accounting of the administrator *cum testamento annexo* of the estate of Sophie S. Pool, so far as the proceeds of the policy in question are concerned.

An order will be made in accordance with the above decision.

Decreed accordingly.

NOTE ON TESTAMENTARY DISPOSITION BY WIFE OF INSURANCE POLICY ON HUSBAND'S LIFE.

GENERALLY.

The common-law right of survivorship in the husband is not abrogated by section 52, Domestic Relations Law, even though the wife cannot assign the policy and the husband cannot compel her to do so, during her lifetime. *Olmsted v. Keyes*, 85 N. Y. 593.

The act of 1873 simply authorized the assignment of such policy where the wife had no child or issue of any child living. *Brick v. Campbell*, 122 N. Y. 337.

WHAT POLICIES AFFECTED.

A policy payable to the wife upon the husband's death, although not issued in the name of the wife or of any third person as her trustee, is substantially in conformity with this statute and for that reason within its protection. *Bloomington v. Lissberger*, 24 Hun, 355.

A policy payable to legal representatives is not for the use and benefit of the wife within the meaning of section 52, Domestic Relations Law. *Dannhauser v. Wallenstein*, 169 N. Y. 199.

ASSIGNMENT BY WIFE.

The policy on a husband's life, payable to his wife, the premiums being paid by him, is not assignable by the wife; the presumption is that the policy was taken out with reference to the statute, although no preference is made thereto. *Brunner v. Cohn*, 86 N. Y. 11.

Nothing short of a written consent by a husband to an assignment of a policy of insurance upon his life for her use and benefit will amount to a compliance with the provision of this section as to an assignment of such policy. *Dannhauser v. Wallenstein*, 189 N. Y. 199.

The provision that such policy may be assigned by the wife with the written consent of the assured, is fully complied with where he unites with her in the assignment; the mere fact that she had children who had a contingent interest in the policy at the time of the execution of the assignment does not render it void; she having survived the maturity of the policy the children possessed no interest whatever therein. *Anderson v. Goldsmidt*, 103 N. Y. 617.

Where policy is made payable to wife and children, assignment by the wife without the consent of the children cannot affect the rights of the children. *Travellers v. Healey*, 86 Hun, 524.

The non-assignability of a policy for the benefit of a married woman does not depend upon whether the premiums were paid by the husband, wife, or a third person. *Frank v. Mutual Life*, 102 N. Y. 266.

WHEN DISPOSABLE BY WILL.

The proceeds of a policy of insurance taken out by a wife on her husband's life, which describes her as being "the assured" and is payable "to said assured, her executors, administrators and assigns," belong to the estate of the wife, although she died before her husband and made him sole legatee and devisee. The executor of the husband is not entitled to the proceeds. *Pool v. New England*, 123 App. Div. 885.

The provisions of this section authorizing a married woman to dispose by will of a policy of insurance on the life of her husband, refers to a contract made by her in her name or in the name of a third person, with his assent as her trustee, for insurance upon the life of her husband, and not to a contract made by him for her benefit. *Bradshaw v. Mutual Life*, 187 N. Y. 347.

Where the wife dies prior to the husband without issue then surviving the interest in such a policy passes to the husband. *Waldheim v. John Hancock*, 59 St. Rep. 413.

A policy of life insurance taken out by the husband who paid the premiums, which is made payable at his death to the wife for her sole use, if living "inconformity with the statute" and if not living to their children, vests a title in the wife, and the proceeds belong to her estate and pass under her will at her death without children, even though she die before her husband. *Bradshaw v. Mutual Life*, 123 App. Div. 885.

INTEREST OF BENEFICIARIES.

Where by the terms of a policy it is payable to the children in the event of the death of the wife before the husband, the children living at her death only can take, and the children of a child who had previously died have no interest therein. *U. S. Trust Co. v. Mutual Benefit Life*, 115 N. Y. 152.

CLAIMS OF CREDITORS.

The legislature intended by section 52, Domestic Relations Law, that such policies should not be subject to the lien of creditors, either of the husband or of the wife, as to the former by the express words of the statute, as to the latter by the determination of the courts. A creditor of

the wife cannot compel her to make an assignment of the policy. *Barron v. Brummer*, 100 N. Y. 372.

But upon the husband's death and upon the vesting in the wife of her interest in the policy no exemption attaches in favor of the wife as against her creditors either before or after the money has been paid to her. *Commercial v. Newkirk*, 16 N. Y. Supp. 177.

Creditors of the wife cannot reach money paid on a policy on husband's life, payable to wife and children. *Leonard v. Clinton*, 26 Hun, 288.

The rights of a creditor as to insurance moneys cannot be determined in a proceeding by a creditor to compel a widow to account as executrix. The proper course is for the creditor to maintain an action to establish and enforce the lien after the assets of the estate have been exhausted and the amount required to pay the remainder of the husband's debts has been established by a surrogate's decree. *Matter of Thompson*, 184 N. Y. 36.

Matter of the Estate of HENRY McKINLEY, Deceased.

(Surrogate's Court, Cattaraugus County, January, 1910.)

MARRIAGE—IN GENERAL—VALIDITY OF MARRIAGE—AFTER ABSENCE FOR FIVE YEARS*—RETURN OF FORMER HUSBAND; RIGHTS OF WIFE IN SECOND HUSBAND'S ESTATE.

Where a woman, whose husband had absented himself for more than five successive years without being known to her to be living during that time, again married in good faith and with the honest belief that he was dead and lived with her second husband more than eleven years and until his death without any decree annulling the second marriage, she is entitled to the statutory exemptions and to her dower in the real estate of her second husband, notwithstanding the subsequent reappearance of her former husband.

Where part of the fund in the hands of the executor and trustee under the will of the second husband consists of rents received from his real estate, the Surrogate's Court has jurisdiction to determine the widow's rights in the real property of the decedent for the purpose of making distribution of the fund.

Proceedings on intermediate accounting of executor and testamentary trustee.

M. B. Jewell, for executor and trustee; Dowd & Quigley, for Rose McKinley; Hudson Ansley, special guardian, in person.

DAVIE, S.—The will of decedent, dated June 11, 1906, was admitted to probate January 9, 1908, and letters were issued thereon to Henry Donnelly, executor and trustee therein named. Decedent left him surviving his widow, Rose McKinley, one daughter, Mercedes McKinley, and two grandchildren (children of a deceased son), his only heirs at law and next of kin, all of whom are under the age of twenty-one years. He left an estate of \$20,000 and upwards in value, a considerable portion thereof being real estate. By the provisions of the will he devised and

* See Note on Presumption of Death, III, 536.

bequeathed the entire estate to his executor and trustee, directed him to manage and control the same; with full power to sell and convey real estate, to invest the proceeds and accumulations and to pay over from time to time such portion of the one-third part of the accumulations to each, the said daughter and grandchildren, as the trustee in his discretion might deem advisable. The trustee was further directed to transfer and convey to the grandson when he became thirty years of age one-third of the principal of such estate, together with one-third of the accumulations, less what might already have been advanced to him; he was also directed to turn over a similar portion to each, the said daughter and the said granddaughter, when they became, respectively, of the age of twenty-five years. No provision whatever was made for the widow, nor does it appear that she has in any manner released or relinquished her right in the estate. Upon the return day of the citation for judicial settlement, the widow appeared and asserted her claim to one-third of the net income arising from the real estate and to such specific articles as she was entitled under the statute. Such claim is controverted by the special guardian upon the ground that, it is asserted, she was not, in fact, the legal wife of decedent, nor entitled to dower in his real estate or share in his personal property. The facts upon which this claim is predicated are somewhat peculiar. In April, 1880, the claimant was legally married to one William Minehan. She lived and cohabited with him until the year 1887, when he went to the State of Ohio in search of employment, having communication a short time thereafter with his wife, but finally disappearing; and, after the year 1887, she heard nothing whatever from him and had no knowledge of his whereabouts. The issue of such marriage was one daughter, now living and over the age of twenty-one years. In June, 1896, the claimant, believing Minehan to be dead, married the said decedent at Portville; and from that time she and decedent continued to live and cohabit together as husband and wife down to the time of decedent's

death, November 22, 1907. Such marriage was evidently entered into in good faith and with the honest belief on claimant's part that her former husband, Minehan, was dead. The issue of this second marriage was one daughter, Mercedes, who is mentioned in the will as a legatee and beneficiary under the trust thereby created. No proceedings were ever instituted during the lifetime of decedent for an annulment of the marriage of the claimant. After the decedent's death, Minehan appeared and visited his daughter and the claimant at their home in Olean. Under such circumstances, what was the legal status of the claimant in relation to decedent's estate? If his legal widow, she was entitled to her statutory exemptions as well as her dower in his real estate, no provision having been made in the will and accepted by her in lieu of dower. While the Surrogate's Court ordinarily has no jurisdiction of the question of title to real estate, yet in this case, as the claimant is asserting her right to the household furniture and to the \$150 additional, as provided by statute (Code Civ. Proc., § 2713), and, as a portion of the proceeds for which the executor and trustee now accounts arises from the rent of real estate, it becomes necessary, as an incident to judicial settlement and distribution to determine, in this connection, the character of claimant's relations to the estate. Under the common law the marriage between claimant and decedent, her former husband being in fact alive, would have been absolutely void. However long his absence from her or however well-founded her belief in the fact of his death, the second marriage would have possessed no element of legality. In England, however, the rigor of such a situation was somewhat ameliorated by Act of Parliament (James I, ch. 2), providing that one marrying a second time, having husband or wife living, but who had been continuously absent for seven years immediately preceding such second marriage and not known to be living, was not liable to prosecution for bigamy. A similar statute was enacted in this State in case of five years' absence. 1 Rev. Acts 1801, 129.

Such legislation, however, did not validate the marriage or give it any legal status, but simply relieved the party from criminal liability. *Williamson v. Parisien*, 1 Johns. Ch. 389; *Fenton v. Reed*, 4 Johns. 52.

A very radical change in this particular was effected by the adoption of the Revised Statutes of this State. It is thereby provided: "Paragraph 6. If any person whose husband or wife shall have absented himself or herself for a space of five years, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority."

This statute also makes provision in relation to the legitimacy and property rights of children who are the issue of a marriage contracted under such circumstances. Under this legislation the marriage existing between the claimant and decedent was neither illegal nor void. It was a legal marriage, subject, however, to the liability that the same might be declared null and void by a court of competent jurisdiction in an action brought for that purpose. When a decree of such a court had been obtained, then the marriage was void only from the date of such decree. No action was ever brought by the decedent during his lifetime for the purpose of procuring the judgment of any court declaring the marriage between him and the decedent to be void. At the time of his death a marriage contract existed between decedent and the claimant formally legally entered into in conformity with the laws of this State, such marriage under the provisions of the Revised Statutes being merely voidable and only invalid after an action had been brought for the purpose of invalidating the same.

The question involved in this case does not appear to have been decided or considered by the Court of Appeals. *Price v. Price*, 124 N. Y. 589, is not an authority in the case under consideration, because, in that case, the husband had procured a

judgment annulling the marriage in question; and, in view of that fact, the Court of Appeals held that the wife was not entitled to dower in the real estate owned by him at the time of the entry of the judgment and of which he was seized at the time of his death. The decisions of the inferior courts in construing this statute (3 R. S. [5th ed.] 227) are so much at variance as to confuse rather than to aid in determining the widow's rights; for illustration, in 1862 the New York General Term (*Griffin v. Banks*, 27 How. Pr. 213) held that a marriage contracted under the conditions specified in the statute, if properly solemnized, had the same force and effect as if the absent husband or wife were actually dead, until it was annulled by a court of competent jurisdiction. This case was subsequently reversed by the Court of Appeals, but upon other grounds and without considering the conclusion cited. 37 N. Y. 621. In *Spicer v. Spicer*, 16 Abb. (N. S.) 112, the General Term of the City Court of Brooklyn held that such second marriage was valid, simply to the extent of preserving the legitimacy and right of inheritance of the children of such marriage, and no further. Both of these cases are cited in *Price v. Price*, not by way of approval or dissent, but for the purpose of distinguishing the facts in these cases from those in the *Price* case. *Valleau v. Valleau*, 6 Paige, 207, relates more particularly to the rights of the first husband when a second marriage had been contracted by his wife on his having absented himself for more than five years and she believing him dead. The court says that, in such a case, the remedy of the first husband is to proceed under the statute and procure a judgment annulling the second marriage; and, if the parties thereto continue to cohabit together after such judgment, then he may maintain an action against his wife for an absolute divorce upon the ground of her adultery. In *Jones v. Zoller*, 29 Hun, 551, the court says, after referring to the statute: "It would seem, therefore, quite clear that such second marriages as come within the terms of the sixth section are not

prohibited, nor are they declared void by a court of competent authority, and they are void only from the time that the nullity shall be pronounced by such court." In this case is cited *Gall v. Gall*, 114 N. Y. 120. In the case last cited, *Vann, J.*, in considering this statute, says: "The section quoted seems to be based upon the probability that the absentee is dead, and is apparently designed to protect the person who, in good faith, acts upon the statute, from evil results if the absentee is actually living. The first marriage is suspended, or, as was held in *Griffin v. Banks* (24 How. 213), it is 'placed in abeyance,' but it is not reinstated by the return of the absentee, because the second marriage becomes void only from the time it is so declared by a competent court. Otherwise, both marriages would be in force at the same time and, to this extent, polygamy would be sanctioned by law. The first marriage ceases to be binding until one of the three parties to the two marriages procures a decree pronouncing the second marriage void. (3 R. S. [6th ed.] 142; Code of Civ. Proc., § 1745.) A statute with such possibilities should be so construed as to promote good order, and the person availing himself of its privilege should be required to act in perfect good faith. (*Jones v. Zoller*, 32 Hun, 280; *Cropsey v. McKinney*, 30 Barb. 47; *McCartee v. Camel*, 1 Barb. Ch. 455.)"

It is recognized as an elementary proposition regarding the requisites of dower that "the marriage must be a legal one, though if voidable only and not void the wife will be entitled to dower if it be not dissolved during the lifetime of the husband." 1 Washb. Real Prop. (3d ed.) 108.

If the marriage under consideration was merely voidable, the widow is entitled to dower, because the same was not annulled during the decedent's lifetime. The real question is as to the effect of the statute upon marriages of this character. Are they valid as legal marriages until annulled? Are they binding like other voidable contracts until annulled or rescinded? Does a decree of annulment relate back of its entry and when once ob-

tained render such marriage void from the time of its inception? As already stated, under the common law such a marriage was absolutely void, but, at an early period in both this country and England, the husband or wife contracting a second marriage under the circumstances existing in this case was relieved from liability to prosecution for bigamy. By the adoption of the Revised Statutes, other incidents of legality were given to such marriages. They were thereby declared to be void only from the date of entry of judgment of annulment. The inference to be derived from the phraseology of the statute is that it was the intention of the Legislature to render marriages of this character good and valid in every particular up to the time that the same might be declared annulled by a court of competent jurisdiction. The decedent, during his lifetime, did not see fit to take proceedings to annul the marriage between himself and the claimant. Such marriage remained in full force and effect down to the time of his death, and the rights of the claimant must be determined by the conditions existing at the time of his death. Under the statute, the marriage between the claimant and the deceased was valid, subject, however, to the disability of being declared annulled, had the decedent seen fit to have taken proceedings for that purpose. Under such circumstances, the claimant is entitled to dower in the estate of the decedent and is entitled to the exemptions from his personal estate provided for by statute.

A decree will be accordingly entered, determining the right of the claimant to one-third of the accumulated and accumulating rents of the real estate of the decedent and allowing her the exemptions specified in the statute as the widow of said decedent.

Decreed accordingly.

Matter of Awarding Letters of Administration upon the Estate
of FRANK SILVETTI, Deceased.*

(Surrogate's Court, Albany County, October, 1907.)

CONSULS—APPEARANCE IN LITIGATION AFFECTING FOREIGN INTERESTS—
ITALIAN SUBJECTS.

The Italian consul is entitled to letters of administration upon the estates of Italian subjects dying intestate within his consular jurisdiction in preference to creditors.

See 145 App. Div. 159.

Application for letters of administration upon the estate of an intestate.

Countryman, Nellis & Du Bois, for Italian consul.

VANDERZEE, S.—Two petitions have been presented for letters of administration herein, one by Mario A. Pacelli as general guardian of Carmine Silvetti, an alleged brother of the deceased, who later presented a supplemental petition stating that he was a creditor of the deceased; the other petition is made by Germano P. Bacceli, Italian consul for this jurisdiction. The consul objects to letters being granted to the other petitioner.

I have examined with great care the reported cases bearing upon the claims of the Italian consul to administration upon the property of Italian subjects dying intestate within his consular jurisdiction, where the entire estate is distributable to citizens resident in Italy. I am constrained to adopt the very learned reasoning of Surrogate Silkman in Matter of Lobrasciano, 38 Misc. Rep. 415, and grant letters in this proceeding to the Italian consul.

This course has been the practice of this court for many years

* Received too late for insertion in proper place.—[REP.]

and has been adopted by many jurisdictions in this State and in Massachusetts. *McEvoy, Public Administrator, v. Wyman*, 191 Mass. 276.

A decree denying the application of Mario A. Pacelli and directing that letters of administration issue to Germano P. Bacelli, the Italian consul, may be entered.

Decreed accordingly.

Matter of the Estate of HARRY E. SANFORD, Deceased.

(*Surrogate's Court, Cattaraugus County, February, 1910.*)

TAXES—INHERITANCE AND TRANSFER TAXES—ASSESSMENT—APPRAISAL—
DEDUCTION OF ADMINISTRATION EXPENSES.

The value of the estate of a deceased person for the purposes of the transfer tax is not to be diminished by the expense of litigation over the relative rights of the distributees among themselves, though such expense may diminish their individual shares.

But the expense incurred in resisting a claim to the entire estate by one who alleges an agreement with the deceased pursuant to which he was to have the decedent's entire estate at his death should be deducted from the value of the estate in making an appraisal.

Proceedings on appeal by the Comptroller, pursuant to the provisions of section 232 of the Tax Law, from the assessment of the tax to which the said estate is liable under the provisions of the Taxable Transfer Act.

I. R. Leonard, for appellant; Dowd & Quigley, for administrators and distributees.

DAVIE, S.—The decedent died, intestate, January 20, 1908, and letters of administration upon his estate were issued to Elzer and Melzer Bushnell, cousins of the decedent, February 5th following. The administrators made application for an assessment of the estate and determination of the tax to which the estate was liable under the provisions of the Taxable Transfer Act. Such appraisal, made by the surrogate, resulted in an or-

der, under date of January 19, 1909, assessing the value of the real estate of which decedent died possessed at \$21,100 and of his personal estate at \$30,913.74, and making deductions therefrom for debts, funeral charges and expenses of administration to the extent of \$17,858.37, leaving the net value of the estate \$34,155.37, and assessing the tax thereon at the rate of five per cent., making the total tax \$1,707.77. The comptroller appeared by his attorney and specifically objected to the deduction of the cost and expenses of certain litigations from the value of the estate before the assessment of the tax. The items so objected to were allowed by the surrogate and constitute a part of the \$17,858.37 above mentioned.

The facts upon which the comptroller's objections were based and necessary to be considered upon this appeal are briefly as follows:

Shortly after the issuing of the letters of administration to the Bushnells, a petition was filed by one Carrie M. Douglas, asking for a revocation of the letters so issued, and for her own appointment as administratrix, alleging in such petition that she was a sister of the decedent and his sole heir at law and next of kin, and that the Bushnells had no interest in the estate and were not entitled to administer thereon. This claim was strenuously controverted by the administrators, and the issue thereby raised came on for trial before the Surrogate's Court; and, after the completion of all the proofs in the case, which were voluminous, the hearing occupying many days, all the parties interested in the estate entered into a stipulation giving the petitioner, Douglas, a certain portion of the estate as her full share and fixing the compensation of the various attorneys who had appeared for the respective parties as follows: To Harry E. Lewis, attorney for petitioner, \$1,100; G. W. Cole, who appeared for certain of the heirs, \$106; I. N. White, appearing for other heirs, \$200; T. H. Dowd, who appeared for the administrators, for services and expenses, \$1,800; stenographer's fees and expenses, \$75.

It was also agreed, as one of the conditions of the settlement, that the fees of the various witnesses who had attended upon the hearing be paid from the estate; the total amount so stipulated and provided for as the expenses and disbursements of the contest being the sum of \$3,732.50.

After the determination of this controversy, an equity action was begun against the administrators and all the heirs at law and next of kin of the decedent by one Frank A. Raymond, alleging that prior to the decedent's death he had entered into a contract with him to the effect that he, Raymond, should support and maintain the decedent and his mother during their respective lives and pay their funeral expenses, and as compensation therefor should have all the estate, real and personal, of which decedent died possessed; and further alleging that he had fully performed such contract on his part, and demanding judgment that his rights be accordingly established, and that the administrators be required to deliver to him the personal estate and the heirs directed to convey to him the real estate of which the decedent died possessed. Answers were interposed in this action on behalf of the administrators and on behalf of the various heirs at law. The action was duly referred and tried before a referee, who reported in favor of the defendants. From the judgment entered upon such report, the plaintiff appealed to the Appellate Division of the Supreme Court, where the judgment was affirmed. The estimated costs and expenses of this litigation over and above the amount recovered from the defendants was \$2,500. It is now claimed on behalf of the comptroller that no portion of the expense of the Douglas litigation should have been deducted before assessing the tax, and that the \$2,500 — estimated expenses of the Raymond litigation — is excessive, and that no greater amount than \$1,500 should have been deducted therefor.

Considering the claim of the appellant that the item of \$3,732.50 — expenses of the Douglas contest — should not have

been deducted before determining the tax, the statute, Tax Law, § 220, provides as follows: "A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases:

"1. When the transfer is by will or by the intestate laws of this State from any person died seized or possessed of the property while a resident of the State."

Upon the death of the decedent, intestate, his estate passed, by operation of law, to his heirs and next of kin, subject, however, to the payment of his legal debts, reasonable funeral charges and legitimate expenses of administration. Such charges diminish the actual value of the estate passing to those entitled. Aside from such deductions, the right of the State to collect the tax in accordance with the statutory rates and provisions attaches to the total value of the estate; the rights of the State and of the distributees become fixed and established at the same instant and immediately upon the death of the intestate. If a controversy subsequently arises as to the relative rights of distributees, involving expense and litigation, the rights of the State cannot be prejudiced or impaired thereby. It is still entitled to the tax upon the full amount passing originally under the intestate laws. While such a controversy may diminish the individual distributive shares, the misfortune is that of the individual, and in that regard is the same as any other necessary expenditure in protecting one's property rights. Any other rule would permit litigating claimants to consume an entire estate with costs and disbursements, entirely defeating the claim of the State. This item should not have been deducted before assessing the tax, this conclusion being entirely in harmony with the result reached in *Matter of Westurn*, 152 N. Y. 93-102; nor is such conclusion in conflict with the decision in *Matter of Gihon*,

169 id. 443. In the case last cited a temporary administration became necessary for the conservation of the corpus of the estate pending contested probate. The reasonable expense of a necessary temporary administration is as much a legal charge upon the estate from the time of its devolution as is the payment of debts or other ordinary expenses of administration. The claim of the appellant regarding the deduction of the \$2,500 item — estimated expense of the Raymond litigation — presents an entirely different aspect. In that case the plaintiff claimed to have become entitled to the entire estate by virtue of a contract between himself and the decedent; in other words, that decedent left no estate passing by virtue of the intestate laws of the State. If Raymond's claim had prevailed, no estate would have remained. Consequently the defense of this litigation was absolutely necessary to establish the fact that there was any estate whatever — a situation entirely different from a controversy between distributees solely regarding their respective interests. It may be stated, as a general rule, that expenses of litigation in conserving and preserving the corpus of the estate are proper deductions before assessment of the tax; but the expense of litigation between distributees over their respective interests, which does not in any manner affect the size or the amount of the estate originally passing, should not be so deducted. In view of the character of the Raymond litigation, the time consumed in the trial of the case and the somewhat protracted nature of the controversy, it would not seem that the estimate of \$2,500 for legal expenses was in any sense excessive. This deduction was a proper and legitimate one.

A decree will be accordingly entered, modifying the former assessment of the tax under the Transfer Act by providing that the further sum of \$13,732.50 is liable to tax at the rate of five per cent.

Decreed accordingly.

**Matter of the Judicial Settlement of Account of Proceedings of
PETER R. VANDERZEE, as Executor of the Last Will and Testa-
ment of GERTRUDE A. VANDERZEE, Deceased.**

(Surrogate's Court, Albany County, February, 1910.)

GIFTS—DELIVERY AND ACCEPTANCE—EVIDENCE—SUFFICIENCY.

Where an executor, upon the judicial settlement of his account, claims that a bond and mortgage formerly belonging to the testatrix, his sister, were given to him by her in her lifetime; and his wife testifies that while the testatrix was living with them she wrote upon the bond and mortgage the words "Jany 31 I have given this have given to Peter" and signed her name and tendered the papers to her brother Peter in the presence of the witness, saying, "I give you this Mallory mortgage," and he, having his arms full of wood and being unable to take it, asked his sister to hand it to the witness, which she did, and the witness afterward put it back with other papers in a box which was used in common by the family, a gift of the bond and mortgage is sufficiently established.

Proceeding upon the account of an executor.

Andrew VanDerzee, for petitioner, Peter R. VanDerzee; William Sanford VanDerzee, in person; Arthur Helme, for James Vanderpool, as administrator of the estate of Margaret E. Vanderpool, deceased; William Selkirk, for Elmwood Cemetery Association; W. H. VanSteenbergh, for Board of Foreign Missions of the Reformed Church in America, and Board of Domestic Missions of the Reformed Church of America; Davies, Stone & Auerbach, for Domestic & Foreign Missionary Society of the Protestant Episcopal Church in the United States of America; Harold D. Alexander, guardian, for Gertrude Vanderpool, an infant.

ADDINGTON (acting), S.—Gertrude Ann VanDerzee, the above-named testatrix, died on the 17th day of March, 1906, be-

ing at the time of her death eighty-six years of age. She left a last will and testament which was duly admitted to probate, and the petitioner, Peter R. VanDerzee, duly qualified as executor.

On October 19, 1908, the petitioner duly filed his account of proceedings as such executor, and petitioned for the final settlement of such account. A citation was duly issued; and, on the return of said citation, James Vanderpool, as administrator of the estate of Margaret E. Vanderpool, deceased, filed objections to said account. The will was probated by me, and this proceeding is before me as county judge of Albany county, and as such acting surrogate, the Hon. Newton B. VanDerzee, surrogate of Albany county, being related to the parties interested.

The testatrix bequeathed "to Domestic and Foreign Missions one hundred dollars." This bequest was claimed by the "Domestic and Foreign Missionary Society of the Protestant Episcopal Church of the United States of America," and by the "Board of Foreign Missions of the Reformed Church in America," and by the "Board of Domestic Missions of the Reformed Church in America," which missions were made parties to this proceeding. The mission first above mentioned withdrew its claim to said bequest.

There can be no doubt from all the evidence adduced that the deceased intended said bequest for the "Board of Foreign Missions of the Reformed Church in America," and the "Board of Domestic Missions of the Reformed Church in America." The testatrix was a member of the Reformed Church of the town of Bethlehem, Albany county, of the denomination known as the Reformed Church in America, for more than sixty years, and was a contributor to the boards of foreign and domestic missions of that denomination for many years. Under all the evidence it is substantially undisputed that said bequest was intended for the Foreign and Domestic Missions of the Reformed Church.

It also appears clearly to me that the testatrix in her will (which is in her own handwriting) first made this bequest \$100, and then changed it to \$200 by writing the word "two" over the "one;" and the evidence is undisputed that the words "one" and "two" are in the handwriting of the testatrix.

The executor in his account claims title by gift to him by said testatrix in her lifetime of a certain bond and mortgage, made and executed by William H. Osterhout and wife to Thomas Mallory, bearing date April 1, 1874, and recorded in the Albany county clerk's office in book 228 of mortgages, at page 44, on a farm of about eighty-one and twenty-four one-hundredths acres of land in the town of Bethlehem, Albany county, N. Y., which mortgage was assigned by Thomas Mallory to John B. VanDerzee, April 2, 1877, and recorded April 27, 1878; and by John G. VanDerzee and others assigned to the testatrix, Gertrude A. VanDerzee, April 1, 1883.

The claim of title to this bond and mortgage and the assignments by Peter R. VanDerzee is contested, which is the only serious contention to the final account filed herein.

It appears that the testatrix, who was a maiden lady and a sister of Peter R. VanDerzee, the alleged donee, lived with her brother, the executor of her estate, and the latter's wife, in the town of Bethlehem, for many years.

The evidence as to the alleged gift of the bond, mortgage and assignments is based solely on the evidence of Maria VanDerzee, the wife of the alleged donee, Peter R. VanDerzee.

The witness testified that, on the 31st day of January, 1906, she and the testatrix were in the sitting-room of their home in the town of Bethlehem, when the testatrix said to her: "Get the Mallory bond and mortgage for me. I want to give it to my brother Peter."

She further testified: "Well, she told me where it was, and I went and got it from the bedroom; it was in a little trunk in the bedroom; that was a trunk in which she kept her papers.

'After I got it I placed it in front of her, on a chair in front of her; she was sitting in a rocking chair. I placed it in front of her on a common chair; she asked me to open it and get these papers for her. I brought the box and the trunk both, and placed them in front of her. She asked me to get the papers out for her, and told me where they were, and I got them and gave them to her, and she asked me for a pencil, and I gave that to her. She wrote on one of those papers with the pencil. (Showing paper.) That is what she wrote on the paper."

On the assignment of the mortgage from Mallory to VanDerzee the following appears written in pencil, as near as I can decipher it:

"Jany 31

"I have given this have given to Peter

G. A. VANDERZEE."

She further testified: "After she had made that writing her brother Peter was passing through the room, with his arms full of wood; she handed those papers to him and said: 'I give you this Mallory mortgage,' and Peter said: 'You might want them yet before you die,' she said: 'I want you to have them.' She handed them to Peter. As his arms was full of wood he couldn't take them, and he said: 'Give them to Maria,' that is me. She handed them to me; I put them away with the other papers."

On her cross-examination she completes her story as to her connection with the papers, and says: "I put them" (bond, mortgage and assignments) "back with all the papers in the box I got it from; in the trunk back in the bedroom."

The evidence further shows that the petitioner kept some of his papers in the box and trunk mentioned above, and that the box and trunk were used in common by the family.

"The gift being *inter vivos*, there must be present five distinct elements in order to invest it with the quality of validity. These elements are: First, that the donor must be competent

to contract; second, there must be freedom of will; third, the gift must be complete, with nothing left undone; fourth, the property must be delivered by the donor and accepted by the donee; and, fifth, the gift must go into immediate and absolute effect." All of these elements in this case are proved to my satisfaction.

I am familiar with the language used by courts in treating of gifts *inter vivos*, such as: "Such a gift should be proved by very plain and satisfactory evidence." *Ridden v. Thrall*, 125 N. Y. 572.

"The evidence which proves the gift should be clear and convincing, strong and satisfactory." *Devlin v. Greenwich Savings Bank*, 125 N. Y. 756.

"In cases of this nature, where claims are presented against a deceased party, it is unquestionably well settled, by repeated adjudications, that the same should be scrutinized with even more than ordinary care in order to prevent, as far as possible, the allowance of unjust and fictitious demands against parties whose mouths are sealed by death." *Rix v. Hunt*, 16 App. Div. 545.

"The rule in such cases is that the gift must be established by evidence possessing the highest degree of probative force." *Rix v. Hunt*, 16 App. Div. 551.

"As there is great danger of fraud in this sort of gift courts cannot be too cautious in requiring clear proof of the transaction. This has been the rule from the early days of the civil law (which required five witnesses to such a gift) down to the present time." *Grymes v. Hone*, 49 N. Y. 23.

And so cases may be cited *ad infinitum* since the subject of gifts was first passed upon, wherein it is held that gifts *inter vivos* must be scrutinized with the greatest care, and should not be upheld unless the evidence in support of the gift is clear and convincing. The law is so well settled that it has become elementary; and the decisions are so numerous in all of our

courts that a reference to authorities is scarcely necessary, as there is a collation of the same cases in almost every decision on the subject. The subject is discussed by the Appellate Division, second department, as late as October, 1909, in a case reported in the advance sheets, official reports, *Tompkins v. Leary*, 134 App. Div. 114, in which the learned justice writing the opinion says: "It must be established by evidence that is clear and convincing;" by evidence which "is very plain and satisfactory," again quoting the language used by courts in former decisions, and citing the cases. In most if not in all of the reported cases, evidence is given against the validity of the gift. In this case, however, the only evidence offered is in favor of the gift. The contestants offer no evidence, but claim that from all the evidence the gift is not established by clear, convincing, plain and satisfactory proof.

When the only evidence of the gift is that of the husband or wife of the donee, it does not follow as a matter of law that the gift cannot be upheld by such evidence alone. *Bouton v. Welch*, 170 N. Y. 554; *Andrews v. Nichols*, 116 App. Div. 645.

The story told by the witness, the wife of the donee, as to what took place between her, her husband and the testatrix is not an unnatural one; nor was it unnatural for the testatrix to make the gift. The donee was her brother, and she had lived in his household for many years.

Each case must rest on its own particular facts; and, if there was no more evidence as to the gift than that which I have discussed, as the rule is that such a gift should be proved by very satisfactory, plain and convincing evidence, in the language of Judge Earl, in *Ridden v. Thrall*, 125 N. Y. 576, this "court might well hesitate to uphold the gift" in question.

However, in addition to the evidence of what was said by the donor, the donee and the witness, we have the additional fact that the testatrix wrote the words on the assignment,

. "Jany 31

. "I have given this

have given to Peter

"G. A. VANDERZEE."

which, together with the whole transaction, leads me to believe that the proof of the gift is "satisfactory and convincing." With this indorsement on the assignment the case is parallel with the Ridden-Thrall case, *supra*.

It is true that the only evidence that the testatrix made the writing on the assignment is that of the wife of the donee; but as was said by Judge Earl in *Ridden v. Thrall*, *supra*, on a similar situation, "The genuineness of this letter was not disputed on the trial." So in this case the genuineness of the writing on the assignment was not disputed on the trial.

In discussing a similar writing, Judge Earl, in *Ridden v. Thrall*, *supra*, says: "While standing alone it would not have been sufficient to establish the gift, it furnishes strong confirmation of the evidence of plaintiff's wife as to the gift, and leaves no reason to doubt that it was made as she testified. It was competent as corroborating evidence, just as the oral or written declarations of the donor previously made would have been, showing the intention to give and thus corroborating the evidence as to the actual gift subsequently made. I have found no authority condemning such evidence. In all cases where probate of a will is contested on the ground of undue influence, fraud, incompetency or forgery, the previous declarations or statements, in any form, of the testator showing an intention in harmony with the instrument offered for probate, have always been held competent—not as sufficient standing alone—but as corroborating the other evidence offered by the proponent."

A decree may be made and entered in accordance herewith.

| Decreed accordingly.

Matter of the Final Judicial Settlement of the Accounts of
ODELL CORNING BUTLER and WRIGHT B. ODELL, as Ex-
ecutors under the last Will and Testament of ESTHER O.
ABEL, Deceased.

(Surrogate's Court, Dutchess County, February, 1910.)

WILLS—INTERPRETATION AND CONSTRUCTION—DESIGNATIONS AND DESCRIPTIONS OF PERSONS, OBJECTS AND PURPOSES—RULES AND IMPLICATIONS—WORDS DESCRIPTIVE OF A CLASS.

Where a testatrix gives her property "to each of my nephews and nieces named as follows" and names eight persons, seven of whom were nephews and nieces by blood and the eighth either a niece by blood or a niece by marriage, both of whom bore the same name, it will be presumed that testatrix intended the niece by blood, unless it can be clearly determined from the will and surrounding circumstances that she intended a stranger to the blood to be her legatee.

Proceeding upon the final judicial settlement of the accounts of executors.

O. W. H. Arnold, for executors; William C. Albro, for Anna E. Odell, niece by the half blood; John E. Mack, for Anna E. Odell, niece by marriage.

HOPKINS, S.—A legacy of \$500 was given under the second clause of the will of the above named testatrix to one Anna E. Odell and is claimed by two persons bearing or known by the same name, viz: one a niece of the half blood of testatrix and the widow of Duane Odell, deceased; the other, the wife of Willis B. Odell, a nephew by blood of said testatrix.

I am asked to determine which one of these claimants the testatrix intended as the object of her bounty; and, in order, if possible, to arrive at a just and fair conclusion, extrinsic evidence was introduced on behalf of both parties, for the purpose solely of identifying the proper legatee, when taken in connec-

tion with the provisions of the will and surrounding circumstances; and I have excluded all testimony except that which bears upon the question of identification.

The provision of said will under consideration reads as follows: "Second. I give and bequeath the sum of (\$500) five hundred dollars to each of my nephews and nieces named as follows:—Ardella E. Dorland, Vina M. Daley, Flora M. Brill, Anna E. Odell, Willis B. Odell, Wright B. Odell and Daniel J. Odell and Sheldon G. Odell, and in the event that none of my said nephews and nieces shall be living at my death, then, the sum so bequeathed to such nephew and niece dying shall become and form a part of the residuum of my estate."

It appears that all the persons named in said clause were related by blood to the testatrix, unless it be the one in dispute. The will was typewritten and dictated to a stenographer by Mr. Arnold, the attorney for the testatrix, who testifies that testatrix said that "she wanted to give her nephews and nieces five hundred dollars each;" that she gave him the names, he writing them down. He also states that there was no direction by testatrix as to the spelling of any of the names and that nothing was said about Willis Odell's wife.

It is also a fact that the niece by the half blood was known and addressed by the various names of "Ann," "Anna" and "Annie." It is also shown that the testatrix and her niece by the half blood were on friendly and social terms, the testatrix having visited her occasionally within the years immediately preceding her death.

The law favors constructions which will not tend to the dis-inheriting of heirs, unless the intention to do so is clearly expressed; so that the property will go to those who are related in blood to the testatrix, rather than to those who would take nothing from the testatrix as heir or next of kin in case of intestacy (*Scott v. Guernsey*, 48 N. Y. 106-120; *New York Life Ins. & T. Co. v. Viele*, 161 id. 11); and expressed words or a

necessary implication is requisite in order to disinherit an heir-at-law. *Brown v. Quintard*, 177 N. Y. 75.

Nephews and nieces mean the immediate descendants of the brothers and sisters of the persons named (*Matter of Woodward*, 53 Hun, 466); and there is no inference that can be drawn from the will, or surrounding circumstances, to indicate that the testatrix intended this legacy for any person other than her niece by blood.

There is nothing tending to show that the testatrix knew of any distinction in the given names, or of the spelling of any such names, of her niece by blood or her niece (so-called) by marriage. If she had it in her mind to distinguish between them, and had intended to make her niece by marriage her legatee, as it has been endeavored to be shown, she would naturally have instructed her counsel to insert in her will a clause, that would have been apparent to any one, that she intended the wife of Willis B. Odell, her niece by marriage, and not the wife of Duane Odell, her niece by blood, and thus avoided any uncertainty as to her intention, or whom she intended.

It makes no difference whether her niece spelled her name "Ann," "Anna" or "Annie;" and, unless we can clearly determine from the will and surrounding circumstances that the testatrix intended a stranger to the blood to be her legatee, the blood relative is entitled to take. I can arrive at no conclusion other than that it is my belief and opinion that the testatrix intended her niece by blood to be her legatee.

Let it be decreed accordingly.

Decreed accordingly.

Matter of the Final Judicial Settlement of the Accounts of
ODELL CORNING BUTLER and WRIGHT B. ODELL as Execu-
tors under the Last Will and Testament of ESTHER O. ABEL,
Deceased.

(*Surrogate's Court, Dutchess County, February, 1910.*)

EXECUTORS AND ADMINISTRATORS: COLLECTION AND REDUCTION TO POSSESSION OF PROPERTY OR CLAIMS OF ESTATE—PROPERTY CONSTITUTING ASSETS—COMMISSIONS OF DECEDENT AS REPRESENTATIVE OF ANOTHER ESTATE: COMPENSATION—RIGHT TO COMPENSATE AND PERSONS ENTITLED—ON ACCOUNTING FOR ACTS OF DECEDENT AS REPRESENTATIVE OF ANOTHER ESTATE.

SURROGATES' COURTS—PROCEDURE AND REVIEW—ORDERS AND DECREES—OPERATION AS BAR OR AS CONCLUSIVE EVIDENCE—SETTLEMENT OF ACCOUNTS—SUBJECTS AND MATTERS CONCLUDED.

A judicial settlement of the account of an executrix is only conclusive in her favor as to such matters as are embraced in it but not as to amounts which she has received and with which she does not charge herself in her account and with which she is not charged in the decree; and such decree need not be opened in order to charge the executrix with such receipts upon a subsequent accounting.

Commissions allowed the executrix upon an accounting by her for a fund which was in the hands of her testator as testamentary trustee at the time of his death belong to the testator's estate and not to the executrix personally.

Proceeding upon the final judicial settlement of the accounts of executors.

C. W. H. Arnold, for executors; C. P. Dorland for Ardella E. Dorland; William C. Albro, for Anna E. Odell; Martin Heermance as guardian *ad litem* for Melvin Channing Butler; John E. Mack, for Theodore Brill and Willis B. Odell, administrators with the will annexed of John U. Abel, deceased; John E. Mack, for Anna E. Odell, wife of Willis B. Odell.

HOPKINS, S.—This is a final judicial settlement of the accounts of Odell Corning Butler and Wright B. Odell as ex-

ecutors of the last will and testament of Esther O. Abel, deceased, who died December 17, 1907.

The testatrix, Esther O. Abel, was the widow of John U. Abel, who died in November, 1893, and of whose will his wife was executrix. After her death, Theodore R. Brill and Willis B. Odell were duly appointed by this court as the administrators with the will annexed of John U. Abel, deceased, and are made parties to this accounting for the reason stated in paragraph "five" of the petition herein which reads as follows: "That Theodore R. Brill and Wright B. Odell as administrators with the will annexed of John U. Abel, deceased, claim that the estate of Esther O. Abel is indebted to the estate of John U. Abel for moneys received by her and for certain investments which she made in her own name, and that they have not filed a regular claim, but your petitioners desire to have them cited to the end that they may be brought into court and their claim, if any, established, so that your petitioners may be able to know the exact amount of the estate which comes into the hands of himself and of his coexecutor as trustees." Thereafter, having been made parties to this proceeding, they appeared and duly filed objections to a large number of items of the account, all of which have been amicably adjusted, except two remaining for this court to pass upon, viz.: first, a note for \$3,800 made by Wright B. Odell to Esther O. Abel in 1894 and which is claimed by the representatives of both estates, and, second, an item of \$461.72 which was allowed Esther O. Abel by a decree of this court dated October 23, 1894, upon her accounting as executrix of the will of John U. Abel, deceased, with a substituted trustee under the will of one Nancy Uhl, deceased, of two trust funds created thereunder, which funds were in the possession of John U. Abel, as trustee under said Uhl will at the time of his death.

John U. Abel left a considerable estate, both in real and personal property, of which his widow was given the use and

income for life. She made an accounting as executrix of his will to this court in 1897, and a decree passing and allowing the same was entered July 13, 1897. Nowhere in her accounts did she charge herself, as such executrix, with the thirty-eight-hundred-dollar note in question. Considerable testimony was taken before me upon the ownership thereof, from which it appears that Mary J. Odell, a sister of John U. Abel, some time prior to his death, made and delivered to him a note of \$3,800 for an indebtedness upon a farm, and that said note was owned and possessed by John U. at the time of his death in 1893. Subsequently, in the spring of 1894, it was arranged between Esther O. Abel, the widow and executrix of the will of John U. Abel, deceased, and Mary J. Odell, the maker of the aforesaid note, that her indebtedness should be cancelled by the making and delivery of a new note signed by Wright B. Odell, a son of Mary J. Odell, who was in possession of the farm heretofore mentioned and who was to assume the indebtedness of his mother, which agreement was consummated by the making and delivery of the note in question, payable to Esther O. Abel individually and not as executrix. Why this was done is partially disclosed by the testimony of Inez Odell, who says, in substance; she was present at the transaction, saw the original note and heard Esther O. Abel say that by so doing it would not have to be put in the inventory, and thus escape the inheritance tax, as she termed it. The testimony of Ardella Dorland tends to corroborate this transaction. This evidence stands uncontroverted. It appears that this note never passed into the estate of John U. Abel, but was continued in the name of Esther O. Abel until her death, and is now in possession of the petitioners claiming it as part of her estate. I do not think their claim well founded. I can draw no inference from the facts in this case to warrant such a conclusion. By canceling the original note made to John U. Abel and accepting one in her own name in tis place and stead, made

by Wright Odell, she could not divest her husband's estate of ownership of the note, or the amount it represented, any more than she could have changed the title by appropriation or investment of any other security. The note and the amount represented thereby was, in my opinion, his; and the note of \$3,800, now in existence, although in her name, belongs to the estate of John U. Abel, deceased.

The evidence relative to the commissions retained by Esther O. Abel and claimed by the estate of John U. Abel, deceased, discloses these facts. John U. Abel was trustee of two trust funds created under the will of Nancy Uhl, deceased: one of about \$6,650 for the benefit of Inez A. Odell, and one of about \$8,400 for the benefit of Edith Brill. After his death, his executrix, Esther O. Abel, took possession of these funds and accounted for the same to this court; and upon such accounting a decree was entered, bearing date October 23, 1894, allowing said accounts, and awarding as commissions the sum of \$461.72 in the following language: "Further Ordered, Adjudged and Decreed that out of the balance so found as above, remaining in the hands of the said executrix, she retain the sum of four hundred sixty-one dollars seventy-two cents for the commissions to which she is entitled on this accounting; * * * that one-half of the total of the said *executrix's commissions* * * * be charged against the share of each of said *cestui que trusts*." From the language of the decree, it seems to me apparent that the intention of the court was to award the commissions to Esther O. Abel as executrix and not individually; and she should have been charged therewith in her account as executrix of the estate of John U. Abel, deceased, but instead she retained the money as her own. Her acts upon accounting for said trust funds were in a representative capacity; and the estate she represented was entitled to the recompense awarded, unless the court, upon such accounting and by the decree made thereon, saw fit and proper

to apportion such commissions between the estate and the representative. This, of course, the court would not do, unless a proper basis therefor was laid, and I find no evidence that the question was raised at that time. I think, therefore, that the decree as to the award of this commission is conclusive and binding upon the parties, and that I am precluded by such decree from passing upon or making any apportionment of such commissions (Code Civ. Pro., § 2472; *Matter of Hood*, 90 N. Y. 512; *Matter of Heaney*, 125 App. Div. 619), and that such commissions belong to the estate of John U. Abel, deceased.

It has been strenuously urged upon this accounting by the petitioners that this court is estopped from passing upon the questions involving the \$3,800 note in litigation, for the reason that the decree upon the accounting of Esther O. Abel as executrix of the will of John U. Abel, deceased, entered July 13, 1897, is a bar, and is conclusive upon all the parties thereto. I agree with this contention only so far as it applies to all matters embraced in the account upon which the decree was based (*Frethey v. Durant*, 24 App. Div. 58); and I hold that, if there were any moneys, securities or other property belonging to the estate in the hands or within the knowledge of the accounting party, not charged in the account or in the decree, then such decree has no binding force or effect upon the property not accounted for, and is not a bar to a further accounting.

It is evident that the note of \$3,800 was not charged in the accounting of 1897; that its ownership was not passed upon in that accounting; and I decide that it is not necessary for this court to open that decree in order to reach such funds or a proper determination in this matter. The representatives of the estate of John U. Abel, deceased, are before this court, having been duly cited, and ask that the moneys which belong to that estate and which never were accounted for by the former

representative be now accounted for and paid to them. They were brought here by the petitioners for that very purpose, to the end that litigation between these estates be forever concluded. Therefore, I conclude that the doctrine of estoppel does not apply to this matter; that the note of \$3,800 is discovered assets belonging to the estate of John U. Abel, deceased, not included in any former accounting of his estate.

Let a decree be entered in accordance with this opinion upon three days' notice by any party.

Decreed accordingly.

**Matter of the Judicial Settlement of the Account of NICHOLAS
LI. RAPELJE, as Executor of FREDERICK DEBBE, Deceased.**

(Surrogate's Court, Kings County, February, 1910.)

**HUSBAND AND WIFE—PROPERTY OWNED JOINTLY OR IN COMMON—NATURE OF
ESTATE—PERSONAL ESTATE—BOND AND MORTGAGE.**

Where a purchase money mortgage is given to a husband and wife, the wife having joined in a deed of the mortgaged premises for the purpose of conveying her dower, upon the husband's death she takes the mortgage absolutely.

Proceeding upon the judicial settlement of accounts of an executor.

Kiendl Brothers (James E. Smyth, of counsel), for executor; Van Mater Stilwell, for objectant, Henrietta Debbé; Jacob I. Bergen, special guardian.

KETCHAM, S.—The dispute arises whether a bond and mortgage for \$12,000 made to the decedent and his wife belongs wholly to the wife or to her and the decedent's estate equally.

The husband and wife joined in a deed of lands belonging to him and upon the conveyance the security in question was made as a purchase-money mortgage. It is admitted that the wife joined in the deed "for the purpose of conveying her dower." The mortgage was in force at the decedent's death.

The stipulation on which the case is submitted admits that the record alone shows the facts in this matter, and this seems to forbid inquiry as to the possession of the bond and mortgage either before or since the death of the husband. The only conclusion is that it was in the possession equally of husband and wife until the death of the former.

Where a husband invests his own money in a security taken in the names of himself and his wife and the investment remains unchanged during his life, if there is no evidence outside of the documentary vestiges of the transaction to characterize its purpose, the security belongs to the wife upon the death of the husband. *Sanford v. Sanford*, 45 N. Y. 723; s. c., on second appeal, 58 id. 69; *Wilcox v. Murtha*, 41 App. Div. 408; *Fowler v. Butterly*, 78 N. Y. 68, 72; *West v. McCullough*, 123 App. Div. 846.

Of the cases last cited the first two are precisely in point. In *Fowler v. Butterly*, *supra*, the rule, though not essential to the decision, is stated as well settled; and in *West v. McCullough*, *supra*, although the simple form of the deposit was not the only evidence of the intention, the conviction of the majority of the court is apparent that in the absence of any supplementary proof the fact of the deposit alone created a presumption or a controlling indication that the parties intended that the survivor should take the fund.

Matter of Albrecht, 136 N. Y. 91, is not arrayed against the rule found in these cases. There the money invested belonged half and half to the husband and wife, and they were, therefore, held to be owners in common of the security. The feature of equal contribution by the parties has been held to

distinguish the case last cited. *West v. McCullough*, 123 App. Div. 849.

The rule by which to determine whether or not the survivor is entitled to the proceeds of the investment should be the same whatever may be the variation in the kind of investment; and the courts have not only applied it upon the same reasoning to notes, bonds and mortgages and deposits in bank, to which husband and wife were parties, but have interchangeably cited the cases arising upon these several forms of investment.

Nothing seems to break the current of these decisions except the case of *Matter of Baum*, 121 App. Div. 496. There it appeared from the opinion that the husband, owning land, conveyed it, his wife joining, and took back a purchase-money bond and mortgage made payable to both husband and wife; that she afterward died and that the husband claimed the proceeds of the security as survivor. With no other fact revealed, the learned court say: "The law of ownership or tenancy by the entirety does not apply to personal property. To enable the husband to take the whole by survivorship there would, therefore, have to be an agreement to that effect, or a gift *causa mortis*, and there is neither here."

The *Baum* case has been read by counsel as authority that, upon the mere taking of the mortgage in the manner described, without further evidence as to intention, neither gift nor agreement for title by survivorship can be found. The opinion admits of no other meaning upon the facts to which it is apparently confined; but the record of the case on appeal discloses convincing evidence and express finding in the court below that the securities were taken "with the intent, understanding and agreement, by and between them, that the wife should have, own and be entitled to an equal share therein with her husband; that her share therein would be one-half thereof, and that upon her death her share should not go to her sur-

viving husband by virtue of survivorship, but should be and become assets of her estate."

Under this proof and finding, the conclusion of the court, that neither gift nor agreement was "there" depended upon the ground not that the law would refuse to deduce one or both of them from the documentary proofs, standing alone, but that neither could exist where an agreement was actually made which excluded both gift and contract.

The case is limited to the proposition that, if parties have made an agreement, it should be applied. It contains nothing to disturb the decisions first cited, *supra*, nor does it stand in the way of the present conclusion that the wife is entitled to the bond and mortgage and to their proceeds.

The decree should settle the account accordingly.

Decreed accordingly.

Matter of the Judicial Settlement of the Accounts of LOUISE L. WILLIAMS, J. HARVEY LADEW and RICHARD T. GREEN, as Trustees under the Last Will and Testament of REBECCA LADEW, Deceased.

(Surrogate's Court, New York County, February, 1910.)

EXECUTORS AND ADMINISTRATORS—DISTRIBUTION OF ESTATE—DUTY AND PROPRIETY OF PAYMENTS OR DELIVERY AND WHEN PAYABLE—ADVANCES ON LEGACIES—BOND OR SECURITY TO REFUND.

Payments of income from trust funds by testamentary trustees to the general guardian of an infant beneficiary during the pendency of proceedings for a judicial settlement of their accounts are proper without requiring a bond, for such income is neither a legacy nor a distributive share within the meaning of section 2746 of the Code of Civil Procedure, and such payments should be allowed to such trustees upon their next accounting.

Proceeding for the judicial settlement of the accounts of testamentary trustees.

Parsons, Closson & McIlvaine, for petitioners; J. Campbell Thompson, for contestants; Raymond M. Lowes, special guardian, etc.; Bernard J. Tinney, special guardian for Elise Wall Ladew, an infant.

THOMAS, S.—After having procured the report of the learned referee who tried the issues in this proceeding to be set aside because it was filed too late, and after much litigation as to how the new trial was to be had, the special guardian objectant offered in evidence the record as made before the referee, and, this being received, all parties rested. I agree with everything that the referee has stated in his opinion, and I adopt that opinion as my own. The payments of income on the trust funds to the general guardian of the infant, pending the accounting and before the making of the former decree, required no bond, for such income is neither a "legacy" nor a "distributive share" (Matter of Tucker, 28 Misc. Rep. 595), and the provision contained in the decree as to the filing of a bond required by section 2746, Code of Civil Procedure, did not defeat the right of the accountants to just credits for such payments. If an objection to the account had been made on that ground by the special guardian, and it was not made by him, such objection would have to be overruled.

The facts set forth in the report of the referee will be included in my decision and the separation of the funds of the separate trusts will be made as recommended by him. All of the objections to the account are overruled. The accountants will be paid costs of the proceeding out of the estate; no costs will be awarded to the special guardian. Tax costs and settle decision and decree on notice.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of Proceedings of MICHAEL NYAHAY, as Executor of the Last Will and Testament of MIKOLAJ ILKOW, Deceased.

(Surrogate's Court, Westchester County, February, 1910.)

CONSULS—APPEARANCE IN LITIGATION AFFECTING FOREIGN INTERESTS—SUBJECTS OF AUSTRIA-HUNGARY.

The Austria-Hungarian consul is not entitled to appear for minors, subjects of Austria-Hungary and legatees under a will duly admitted to probate in this State, in a proceeding for the judicial settlement of the executor's account, without citation having been served upon them.

Proceeding upon the judicial settlement of the accounts of an executor.

Arthur J. Burns, for executor; Arpad A. Kremer, representing consul-general of Austria-Hungary.

MILLARD, S.—The testator in this case died in the city of Yonkers, March 30, 1907, leaving a last will and testament in and by which he appointed Michael Nyahay, of Yonkers, as executor. The will was admitted to probate in this county and the executor qualified and a year and upwards has elapsed since letters testamentary were issued to him. He has filed an account of his proceedings and a petition requesting that a citation be issued to all persons interested in the estate for the judicial settlement of said account. The Austria-Hungarian consul, represented by an attorney, objects to the issuance of citation to four of the legatees who are minors, residing in Austria-Hungary, as unnecessary and claims that he is entitled to appear for them and receive their share of the estate without the issuance of a citation directed to be served upon them. I have carefully examined the briefs submitted to me by the respective parties and am thoroughly convinced that practically

all of the decisions heretofore made apply to an intestate's estate and not to one where a will has been duly made and proven, under which an executor has been appointed who can be compelled to account and who should be entitled to a discharge, made as is usually had in accordance with the laws of this State. The claim of the consul is based upon the fact that the citizens of Austria-Hungary are entitled to all the benefits and privileges granted to the most favored nation under any of the treaties made between this country and any foreign country and claims that the consul under such conditions is entitled to appear for the minors who are citizens of Austria-Hungary. I cannot conceive it possible that greater privileges could be granted to alien infants than are granted to our own, residing in this State; and it has been settled beyond all question that even a general guardian appointed for minor infants cannot waive the issuance and service of a citation.

I, therefore, can see no possible course open to the executor here but to take and serve in the usual way a citation, duly returnable in this court after proper service of the same has been made.

I therefore decide that citation should issue directed to the parties in interest, to be served in the way provided by law.

Decreed accordingly.

**Matter of the Application for the Appointment of a Guardian
of the Property of SPOFFORD F. WYCKOFF, an Infant.**

(Surrogate's Court, Chemung County, March, 1910.)

GUARDIAN AND WARD—APPOINTMENT, QUALIFICATION AND TENURE OF GUARDIAN—RIGHT TO APPOINTMENT—NOMINATION BY INFANT; MOTHER.

Where, upon an application by a male infant, nineteen years of age, for the appointment of a guardian of his property, he nominates another person than his mother, and the mother opposes the appointment of the nominee and prays that letters be issued to her, and it appears that the infant's motive is to humiliate his mother and indicate his independence in business affairs, and the mother's motive is to demonstrate to her son her maternal rights and enforce complete obedience to her during minority, the court will appoint neither, but will select a trust company.

Application for appointment of a guardian.

Jared T. Newman and Alex. D. Talck, for petitioner; Frank S. Bentley and Richard H. Thurston, for objector; George R. Hemingway, special guardian.

MCCANN, S.—The petitioner, Spofford F. Wyckoff, is a resident of the State of Connecticut and is nineteen years of age. He has made a petition to this court in which he "prays for a decree appointing a general guardian of his property within the State of New York."

The petition is made under section 2822, subdivision 1, of the Code of Civil Procedure. Petitioner nominates Ira S. Bower of Hector, Schuylar county, as such guardian, subject to the approval of the surrogate.

The petitioner's father is dead. A citation was served upon the mother of the petitioner, she also being a resident of the State of Connecticut. The mother has filed objections to the appointment of Ira S. Bower and has asked that she be appointed

as such guardian instead of said Bower. The only property in the State of New York over which a guardian could have any control is a house and lot located in the city of Elmira. The petitioner, Spofford F. Wyckoff, asserts his right to nominate whomsoever he chooses as guardian and takes the position that this court has no authority to appoint any person other than the one nominated by him, and that this court must either appoint as his guardian Ira S. Bower or dismiss the proceeding. Therefore, according to the argument presented by the petitioner, the only questions before this court are:

1. Is a general guardian of the property necessary, and
2. Is Ira S. Bower a proper person to be appointed?

Considerable testimony has been introduced on both sides: first, to show that Ira S. Bower is not a proper person; and, second, to show that the mother of Spofford F. Wyckoff is not a proper person.

It is unnecessary to discuss the ability of either of these persons to act as guardian of the property of the petitioner. The petitioner is nineteen and one-half years old and the guardianship can only extend a year and a half. There is nothing to care for except a house and lot, and there is no doubt, in my opinion, that either Ira S. Bower or the mother, Anna Mitchell, is competent to act, so far as concerns their ability to manage the property in question. I do not believe that it is for the best interests of the infant that either of these parties should act as the guardian of his property. It appears from the testimony that the relations between the petitioner and his mother are harmonious, generally speaking, except in matters pertaining to property. There has long been a dispute between the mother and the son as to the ownership of certain property of which the father of the petitioner was possessed and which property is claimed by both the petitioner and his mother. These property matters have given rise to some strained relations between the mother and the son. On the other hand, it is submitted that Ira S.

Bower is not a proper person to care for the property, because of his relationship to the executor under the will by which the petitioner came into possession of this property as devisee, and which relationship might result in prejudicing the rights of the petitioner for reasons which it is not necessary to discuss here at length. In rendering my opinion in this matter I pass over these questions with the simple statement that I believe that the son nominates Ira S. Bower to act as his guardian for the purpose of indicating to his mother his independence of her in business affairs and for the purpose of humiliating her, to a certain extent, by demonstrating to her that, through this court, he can procure the appointment of some one other than her to act as the guardian of his property. I also believe that the opposition offered by the mother to the appointment of Ira S. Bower, and the request that she be appointed the general guardian, are for the purpose of demonstrating to the son her maternal rights and thereby proving to him that he must be absolutely obedient to her in all matters relating to his person or property until he shall arrive at the age of twenty-one years.

If this were an application for the appointment of a guardian of the person, a different view might be taken of the situation; but, inasmuch as the only guardianship here requested is that of the property, it seems to me the mother should not be appointed the guardian of the property, when there is already a controversy between the mother and the son over the settlement of the estate of the petitioner's father, the deceased husband of Mrs. Anna Mitchell. To put her in the position of guardian of the property which the son has acquired from another source would only tend to aggravate the feeling which now exists between the mother and the son. To gratify the wishes of the petitioner by the appointment of Ira S. Bower would only result in the same manner and, while perhaps it is not the province of this court to take into consideration the effect that this appointment would have upon the personal attitude of the mother and son toward

each other, nevertheless this decision is based largely upon that proposition.

Authorities have been presented to show that in certain cases parties other than the parents may be appointed guardians. There seems no doubt of this legal proposition. The only legal proposition about which there seems to be any question in this case is the one which is raised by the petitioner with reference to which the attorney for Mrs. Mitchell says, "This question is not free from doubt." The proposition is this: If the surrogate is of the opinion that Ira S. Bower should not be appointed, has he the jurisdiction to appoint the mother or any third person?

The language of the Code requires that a petitioner over fourteen years of age must nominate a guardian, but I do not believe that the court to which the petition is made is bound to appoint the person so nominated. I believe that the petitioner, when he prayed "for a decree appointing a general guardian of his property within the State of New York," submitted that property, by his own act, to the jurisdiction of the court, and that the court has the right to appoint the person nominated, or any other person who may to the court seem a proper party to act.

This question does not seem to have been squarely decided in any case which has been submitted to me upon the briefs of the opposing parties. I have read the provisions of the Code of Civil Procedure with reference to the appointment of a general guardian, especially the provisions of section 2826, which says: "A guardian, appointed upon the application of an infant of the age of fourteen years or upwards, as prescribed in this article, must be nominated by the infant, subject to the approval of the surrogate." I have also read rule fifty-three of the Rules of Practice and the various cases cited upon the brief of counsel, to wit: *Ledwith v. Ledwith*, 1 Dem. 154; *Matter of Barre*, 5 Redf. 64; *Johnson v. Borden*, 4 Dem. 36; *Matter of Tully*, 54 Misc. Rep.

184; *Matter of Vandewater*, 115 N. Y. 669; *Matter of Buckler*, 96 App. Div. 397; and, also, the references to the three works of Jessup, Redfield and Heaton, respectively, where these matters are discussed. After a careful reading of the cases and text-book references above cited, I am satisfied that the Legislature did not intend that an infant over the age of fourteen years should have the power to absolutely prevent the court from appointing a guardian to care for his property by nominating as a guardian some person who such infant knew would not be acceptable to the court. A series of nominations of objectionable parties could be made by the infant; and, if the court had no power over the subject-matter other than to appoint the person nominated or to dismiss the proceeding, the property of the infant might eventually be wasted, simply because such infant might not be willing to submit to the appointment of some person other than the one whom he personally desired.

In the case of *Ledwith v. Ledwith*, 1 Dem. 156, it is said: "I certainly shall not hold that an infant of fourteen years has this plenary authority to emancipate himself at pleasure from parental control, unless the language of the law forbids me to give it other interpretation, and such is by no means the case."

It might be said with equal force that the court should not hold "that an infant of fourteen years has this plenary power to emancipate his property at pleasure from the control of the court." Such emancipation certainly might be the result in case an infant should desire to embarrass the court by a series of objectionable nominations.

The real issue in this proceeding is, who, if any one, should be appointed general guardian of the property of the petitioner. But behind this issue there exists another, which is the strife between the mother and the son to see who can be victorious in dictating this appointment.

I do not believe it is for the best interests of either mother or

son that this court should lend its encouragement to the extent of being a factor in permitting either the mother or the son "to win a victory over the other."

An order may be prepared appointing the Chemung Canal Trust Company as guardian of the property of Spofford F. Wyckoff within the State of New York.

Decreed accordingly.

Matter of Proving the Last Will and Testament of JENNIE LIVINGSTON WALKER, Deceased.

(*Surrogate's Court, Rockland County, March, 1910.*)

WILLS—THE TESTAMENTARY INSTRUMENT OR ACT—EXECUTION OF WILL—EVIDENCE OF EXECUTION—SUFFICIENCY OF EVIDENCE—TESTIMONY OF SUBSCRIBING WITNESS.

Where a will is followed by a full and explicit attestation clause and the signatures of the testatrix and the witnesses are subscribed in the proper place, and, upon the proceedings for probate, a subscribing witness testifies that the testatrix at the time of its execution neither declared the instrument to be her will nor requested the witnesses to sign as such, but it is apparent his memory was uncertain and unreliable, and nineteen years have elapsed since the execution of the will, and it was drawn by the husband of the decedent, an attorney of forty years' experience, who knew the statutory requirements and appended the attestation clause and was present and superintended the execution, and there is no evidence of fraud or undue influence, the instrument will be admitted to probate.

See 73 Misc. 154.

Proceeding upon the probate of a will.

Benjamin Levison (Abram A. Demarest, of counsel), for proponent; Howe, Smith & Howe, for contestants.

McCAULEY, S.—There is offered for probate in this proceeding a written instrument which bears date March 12, 1890, and

purports to be the last will and testament of Jennie Livingston Walker, deceased.

The decedent died January 7, 1909, and is survived by her husband, the petitioner, a son and two daughters. The instrument, which is in all respects in the form of a will, was written by the decedent's husband, and he is named as the executor thereof and sole beneficiary thereunder. The son and daughters have filed an answer to the petition wherein they object to the probate upon three grounds, namely: (1) that the instrument offered for probate is not the last will and testament of the decedent and that the execution thereof was not her free, unconstrained or voluntary act; (2) that the instrument was not subscribed, published and attested as and for her last will and testament in conformity with the statute in such case made and provided; and (3) that the instrument is invalid as a last will and testament and is illegal and void.

The instrument contains the usual attestation clause, which states that, upon its execution all the statutory formalities were observed with respect to the execution of wills.

It was subscribed by the decedent in the presence of two attesting witnesses who, at the same time, in her presence and in the presence of each other, subscribed their names as witnesses. These facts were proven by the testimony of the subscribing witness who survived the decedent and are undisputed. The decedent's signature was written at the end of the instrument; then followed the attestation clause, and the signatures of the subscribing witnesses, to which were added their respective places of residence.

The instrument was executed on the day it bears date at the decedent's home in New York city. William H. Spencer, one of the subscribing witnesses, died prior to the decedent's death; but the surviving witness, George A. Sturtevant, was produced by the proponent and his examination and testimony were taken upon the hearing. The proponent also produced proof of the

handwriting of the decedent and of the deceased subscribing witness. The contestants produced no witnesses, but rest their case upon the facts adduced upon the examination of the surviving witness. There are, in reality, but two objections upon which the contestants rely, namely: first, that the decedent did not, at the time of its execution, declare the instrument to be her last will and testament; and second, that she did not request the two attesting witnesses to sign it as such.

The witness Sturtevant testified, among other things, that the instrument was executed in the evening in the dining-room of the decedent's home; that he was requested to witness the decedent's signature by her husband, as was also Mr. Spencer, as he supposed; and that she said nothing at all to him or in his presence at the time of the execution of the instrument. He also testified that the attestation clause was not read to or by him; that he did not know and that the decedent gave no intimation of what the instrument was, and that she did not suggest, or in anywise manifest a wish, that he sign it as a witness.

He never saw the instrument after its execution until shortly before it was offered for probate, when it was exhibited to him by the decedent's husband. The witness called frequently at the decedent's home and was on terms of intimacy with her family. He became indebted to the decedent's husband in a considerable amount about the time of or shortly before the execution of the instrument. This indebtedness was never paid; and some time after the execution of the instrument his visits at the decedent's home ceased, and the intimate relations which had theretofore existed were terminated.

The witness, having testified, in substance, that there was no publication of the will and that he and Spencer had attested its execution without being requested to do so by the decedent, was examined rigidly and at length with respect to various other matters having some relation to the execution of the instrument, and it was made apparent that his memory was not to be relied

upon and trusted. For example, he did not remember in what part of the house he was, nor in whose company he was requested by the decedent's husband to go to the dining-room to witness her signature; he did not remember whether the decedent was seated at the table or standing when she signed her name to the instrument; he did not remember why he added to his signature his place of residence and thereby fulfilled a statutory requirement, nor did he remember who took possession of the instrument after its execution or what disposition was made of it. These are but a few of many instances wherein his memory failed him. The following brief quotation from the examination of the witness will show how uncertain and unreliable his memory of the transaction was:

"Q. I want to know not what took place in the hall; I want to know what took place in the way of conversation in the dining-room between you and Mr. Walker, or any other persons that were in that dining-room while you were there? A. I do not recall any conversation at all, sir. Q. None at all? A. No. Q. You mean to say by that that none did take place, or you do not recollect? A. I don't recollect what the conversation was. Q. You do not state there was no conversation, do you? A. No, I do not state that. Q. And, if there was a conversation, you want the court to understand that you do not remember what it was; is that true? A. No. Q. Is that true? A. In a measure it is true. Q. Because whatever conversation was had in that dining-room after you entered it between any of the persons that were therein your company is entirely a blank and has passed from your memory; is that true? A. Yes. Q. And you cannot recollect any of the conversation at all? A. I said so. Q. Then all you say and all you remember as to what took place in that dining-room, as far as your recollection aids you at the present time, are the acts that were performed by the various parties? A. Yes." By the Surrogate: "Q. What I want to know, Mr. Sturtevant, is this: may it or may it not have been

possible for things to have transpired there at the time of the execution of the will as to which your memory would fail to serve you, a period of nineteen years having elapsed meanwhile? A. Oh, there may have been, but the things that appeal to me I remember; the things that have a vital interest to me; those are the things that I have thought of and recall."

The evidence of the witness is to some extent contradictory, and is uncertain and unsatisfactory; and, after a careful consideration of it, having in mind the long period of time, namely, nineteen years, that has elapsed since the transaction to which it relates occurred, I am led to the conclusion that his statement that there was no publication of the will cannot be relied upon, and I am unwilling to accept it as true.

There are several facts which tend to show that there was a proper execution of the will. It was drawn by the decedent's husband, an attorney of some forty years' experience, who knew what the statutory requirements were, and who had appended to the will an attestation clause that was full and explicit. He was present when the will was executed and superintended its execution. These facts afford a strong presumption that the statutory requirements were complied with. There is no evidence of fraud or undue influence. My conclusion, upon all the evidence, is that the will was published and attested as required by law; and that the witness Sturtevant has forgotten or errs in his recollection of the occurrence.

The statute (Code Civ. Proc., § 2620) provides that "If all the subscribing witnesss to a written will are, or if a subscribing witness, whose testimony is required, is dead, * * * or if such a subscribing witness has forgotten the occurrence, or testifies against the execution of the will; the will may, nevertheless, be established, upon proof of the handwriting of the testator, and of the subscribing witnesses, and also of such other circumstances as would be sufficient to prove the will upon the trial of an action."

This section received a practical construction in *Brown v. Clark*, 77 N. Y. 369; *Matter of Pepoon*, 91 id. 255; and *Matter of Cottrell*, 95 id. 329, where it was held to mean, in accordance with prior decisions cited, that the proof of circumstances bearing upon the question of the authenticity of the will in connection with a regular attestation clause was, if sufficient to satisfy the court of its genuineness, all that was required to sustain the probate of a will. It was accordingly held in the *Cottrell* case that a will may be admitted to probate against the positive testimony of both the attesting witnesses that they were not present when it was executed and did not sign as witnesses, if the genuineness of their signatures to the attestation clause and of the testator to the will is proved by other evidence; and, also, that it is always considered to afford a strong presumption of a compliance with the requirements of the statute in relation to the execution of wills, that they had been conducted under the supervision of experienced persons.

The precise force which should be accorded to a full attestation clause, regularly authenticated, is not very clearly defined in the cases; but they all agree in the conclusion that it is entitled to great weight in the determination of the fact involved. *Orser v. Orser*, 24 N. Y. 55; *Matter of Hesdra*, 119 id. 615; *Matter of Kane*, 20 N. Y. Supp. 123.

It has been held that mere want of recollection on the part of the witnesses will not invalidate the instrument, and the courts, in establishing the wills propounded, have done so upon the ground that they were satisfied from the circumstances proved that the wills were duly executed and that the witnesses had forgotten, thus relieving the parties interested against the infirmities of humanity and the uncertainty of human recollection. *Lewis v. Lewis*, 11 N. Y. 220.

In the case of *Woolley v. Woolley*, 95 N. Y. 231, cited by the learned counsel for the contestants, the court, in commenting upon the evidence on which probate had been denied, drew a

very clear distinction between a will executed within a recent period before it was offered for probate and one offered for probate a long time after its execution. On page 234, the court observes: "This evidence was given within about a year after the alleged codicil was executed, and hence the case is not to be treated like one where an attempt is made to prove a will after the lapse of a long time, when witnesses may not be able to testify fully to the statutory requirements from a failure of memory. In such case a regular and full attestation clause, with very slight proof or confirmatory circumstances may be held sufficient."

In *Matter of Sizer*, 129 App. Div. 7, recently decided, and affirmed on appeal by the Court of Appeals, without opinion (195 N. Y. 528), the will was offered for probate upward of eight years after its execution. There were three attesting witnesses, two of whom testified that they had no recollection of signing the will, or of being asked to, or of anything connected with it, but acknowledged their signatures to be genuine. The witness who signed last (the third witness) testified that he did not know what the paper was, and that the testator did not say. The will contained a full attestation clause. The court, in commenting upon the evidence upon which the will was admitted to probate, at page 9, says: "In the present case, therefore, the surrogate was permitted, the recollection of the subscribing witnesses failing, to resort to such other evidence as is receivable in an action. He had before him a full attestation clause and proof of the signatures of the testator and the subscribing witnesses. Was this alone evidence of the execution of the will with the formalities required by law? It was. There is no requirement of an attestation clause, but it is nevertheless recognized as evidence by the courts, and received, when necessary, and, after proof of the signatures of the testator and the subscribing witnesses, as *prima facie* evidence of the facts certified by it. On examining the cases in this State, it will be found

that many of them say that the attestation clause, with proof of the signatures of the testator and the witnesses, 'and other facts and circumstances' proved in the particular case, sufficed for the probate of the will; but from this, the negative, that such clause and proof of signatures alone would not have made out a *prima facie* case, and upheld the probate, must not be drawn.

* * * Though the cases are few in this State where the court was called upon to say, and did say, that the attestation clause with proof of the signatures was alone evidence of formal execution, or made out a *prima facie* case, an analysis of all the cases in this State will show that rule to be generally recognized; and there is abundance of authority for it elsewhere, in England and in our States." See, also, cases cited on page 10; *Matter of Abel*, 63 Misc. Rep. 169.

With respect to the publication of a will, it has been held that no particular form of words is required; a substantial compliance with the requirements of the statute as to execution and attestation is sufficient. *Lane v. Lane*, 95 N. Y. 494; *Matter of Beckett*, 103 id. 167; *Matter of Hunt*, 110 id. 278.

Will admitted to probate. Formal findings may be presented with the decree.

Probate decreed.

NOTE ON THE ATTESTATION CLAUSE.

Its purpose is to preserve in permanent form a memorandum of the salient facts attendant upon the execution of the will, in order that the facts may still be proved, though the witnesses be dead or their memory be defective at the time the will is offered for probate. *Matter of DeHart*, 67 Misc. 13.

It is *prima facie* evidence of the facts therein stated. *Walsh v. Walsh*, 4 Redf. Surr. 285.

Its use is not, however, necessary to the valid execution of the will. *In re Phillips*, 98 N. Y. 267.

It is part of the will, if the subscription follows the attestation clause, and such a subscription is held to be "at the end of the will." *Younger v. Duffie*, 94 N. Y. 535.

Held no part of the execution of the will, and that its form is not essential. As a memorandum of facts then transpiring, it is very useful, and on the death of the witnesses, it may be prima facie evidence that the formalities which it recited were enacted, but it is not indispensable. *Jackson v. Jackson*, 39 N. Y. 153.

Taken together with proof of the signatures of the testator and the subscribing witnesses, it is prima facie evidence of due execution and sufficient for probate until overcome by opposing evidence. *Matter of Sizer*, 129 App. Div. 7.

It is no tenable ground of objection to the validity of a will that the attestation clause omits to state that the will was signed by the subscriber as a witness at the request of the testator. *In re Crittenden*, Myr. Prob. (Cal.) 50.

No harm is done by the incorporation of some of the words of the attestation clause in the will proper. *Matter of DeHart*, 67 Misc. 13.

A proper attestation clause which is not read to or by the testator will not supply defects in the publication of the will. *Remsen v. Brinkerhoff*, 26 Wend. 35.

The fact that the attestation clause is defective, erroneous or incomplete in its recitals of the facts which are necessary to the due execution of the will, is no valid objection to the will, if it can be established that the necessary formalities were in fact observed. *Matter of Cornell*, 89 App. Div. 412.

Omission from the attestation clause of a statement that the witnesses signed in the presence of testator is no valid ground of objection to the validity of the will. *Fatheree v. Lawrence*, 33 Miss. 585.

Nor is the omission of a statement that the testator was of sound mind and memory. *Murphy v. Murphy*, 24 Mo. 526.

Matter of the Will of MARY A. DeHART, Deceased.

(*Surrogate's Court, Tompkins County, March, 1910.*)

WILLS*—THE TESTAMENTARY INSTRUMENT OR ACT—REQUISITES, FORM AND VALIDITY—SIGNATURE AT END OF WILL: EXECUTION OF WILL—EVIDENCE OF EXECUTION—PUBLICATION; REQUEST.

Where a testatrix writes her name in a blank space left for that purpose in the body of the attestation clause immediately following her holographic will, she has subscribed the will at the end thereof within the meaning of the statute.

And where, having produced the instrument in question before the subscribing witnesses, the testatrix converses with them about it in such a manner as to indicate clearly the nature of the instrument, and, after signing herself in the presence of the witnesses, hands the pen to one of them who signs the attestation clause and then hands the pen to the other who thereupon signs his name in like manner, a sufficient publication of the will and request to the witnesses to sign as such is shown.

Proceedings on the contested probate of a will.

R. Horton (M. N. Tompkins, of counsel), for petitioners; George F. Slocum, for Nellie Albright and Grant Lawrence; Scott W. Crane, for Arthur Lawrence et al.; Hugh W. Darrin, special guardian, for Alice Lawrence, an infant; E. H. Bostwick, special guardian, for Lewis Lawrence, an incompetent.

SWEETLAND, S.—This is a proceeding for the probate of the will of Mary A. DeHart. The will produced is holographic, with a holographic attestation clause, written on one page of foolscap paper, being entirely in the handwriting of the testatrix except the names and residences of the attesting witnesses. The will, so far as is material for the consideration of this case, commencing two sentences above the signature, reads as follows:

* See Note on Holographic Wills, I, 138.

"Likewise I make, constitute and appoint said Alzina M. Straight to be sole executrix of this my last will and testament. The above written instrument was subscribed by MARY A. DEHART, MARCH 10TH In the year of our Lord nineteen hundred and eight and Mary A. DeHart acknowledged to each of us that this instrument so subscribed to be her last will and testament and we at her request have signed our names as witnesses and written opposite our names our respective places of residence.

"Darwin Rumsey, residing at Enfield, Tompkins Co., N. Y.

"Samuel J. Rumsey, residing at Newfield, Tompkins Co., N. Y."

(The signature and date written in the presence of the attesting witnesses are indicated by large type.)

The will is contested by heirs of the decedent on the ground that it is not executed as provided by the statutes of the State of New York. They insist that the will was not signed at the end by the testatrix, and that publication thereof is defective. There is no claim that the testatrix was not competent to make a will, and there is no suggestion of fraud or undue influence.

The testimony of the subscribing witnesses fully established the due publication of the will, providing their testimony is true.

Darwin Rumsey, one of the subscribing witnesses, a neighbor of the testatrix, had known her for years. He has been justice of the peace, is a farmer, and has made his will, and has had some other experience in the preparation of wills. The day the will was executed, the testatrix telephoned him to come to her residence and to bring some one with him. In response to that call, he went to the residence of the testatrix, taking with him his son, Samuel Rumsey. Their testimony is clear and positive. They testified that, after they had reached the home of the testatrix, she said she had made her will and wished them to sign it as witnesses; she then went to a bureau in the same room and

brought out the will, placed it on the table, saying she had written it herself, and that it was just as she wanted it; that she could do it just as well as any one else; that her mother had written her own will, and that she, the testatrix, had copied from her mother's will. On the sixth line from the bottom was a blank space extending from the right side three-fourths across the page. On this blank line she wrote her name, "Mary A. DeHart," and after it the words "March 10th," the date of execution; those words nearly filling the blank space, being written somewhat coarser than the other part of the will. She then handed the pen to the elder Rumsey, who then and there wrote his name and address on the will at the end of the attestation clause; and he in turn handed the pen to his son, Samuel, who thereupon wrote his name and address on the line immediately under his father's. Both witnesses saw her sign the will and they signed as witnesses in her presence and in the presence of each other, all using the same pen and ink from the same bottle. The subscribing witnesses are intelligent persons, of good standing.

The statute provides: "A will shall be subscribed by the testator at the end of the will." This requirement is an essential, but it is to be construed liberally in favor of the will and no rules of construction should extend beyond the requirement of the statute. *Hoyradt v. Kingman*, 22 N. Y. 372.

The reason for requiring the signature of the testator to be at the end of the will is for the purpose of avoiding additions to the will after its execution. The law does not require any particular form for the wording of a will, and it is very usual to find words and phrases in a will other than disposing words. It is not unusual to find words of advice and direction in a will, as well as requests. A will may be valid without making any disposition of property; as, for example, where a will merely appoints an executor. It is a rule of very general application that surplus words in a document do not vitiate it; so, in the will

under consideration, some of the words of the attestation clause are incorporated in the will, and that is in no sense harmful. The attestation clause is no necessary part of the will. *Jackson v. Jackson*, 39 N. Y. 156. A regular attestation clause is useful as a memorandum of the essentials that occurred at the time of the execution of the will and as an aid to the memory of the witnesses, and is especially valuable in case of the death of the subscribing witnesses. It is not essential to the validity of a will. The form of the attestation clause is not material.

In considering this case, we find that an almost similar question has been before the courts on other occasions. In the case of *Younger v. Duffie*, 94 N. Y. 535, the testator signed at the end of the attestation clause and after his signature came that of the subscribing witnesses, which was held a substantial compliance with the statute, and that the signature was at the end of the will; citing *Matter of Gilman*, 38 Barb. 364, holding in substance that, if no disposing provision follows the testator's signature, the signature is at the end of the will. In *Will of Cohen*, 1 Tuck. 286, the testator signed beneath the attestation clause, and the execution was held good. Under an English statute of wills (1 Victoria, ch. 28, § 9) similar to ours, a testator signed his will by writing his name in the attestation clause. It was held that the signature was at the end of the will and the will entitled to probate. *Goods of Walker*, 2 Swab. & T. 354. In *Matter of Noon*, 31 Misc. Rep. 421, the testator used a printed will blank on which she wrote her will and subscribed in the attestation clause. The court held that the name being in the attestation clause was at the physical end of the will, inasmuch as the attestation clause is not a necessary part of the will. *Matter of Acker*, 5 Dem. 19, is to the same effect.

It is clear from the above decisions that the testatrix, by signing in the attestation clause, incorporated in her will a part of the attestation clause, which is surplusage; and the signing was as truly at the end of the will as though she had signed just

above the attestation clause, as is usually done. The testatrix in this case did not divide her will into paragraphs, the whole will being one solid paragraph. I am satisfied that she complied with the requirements of the statute as to the signing of the will.

Some of the contestants have confused the case, *Sisters of Charity v. Kelly*, 67 N. Y. 409, thinking it authority against this will; but I do not so read that case, which is easily distinguishable, the facts being different in the two cases, as *Kelly*, the testator, signed after the witnesses had signed. There is nothing in the *Kelly* case that can be construed as an authority against the will in question.

The testatrix wrote out her will complete before the witnesses arrived, except the right three-fourths of the line on which she subsequently signed, which was left blank until she signed it in the presence of the attesting witnesses. The law does not prohibit a testator from writing her will. If the will had been written by some other person except the above referred to part of the line and the testatrix had subsequently signed on that line, as she did, the argument of the contestants would lose all force and its fallacy be apparent. Suppose, by way of illustration, the executrix had produced for execution, instead of this will, one identical in words, typewritten, with the identical blank line, and the testatrix had, under identically the same circumstances, written her name and after it, March 10th, in the blank space. Would the execution of the will be open to question? Surely, by writing this will herself, the execution was not weakened, but strengthened.

It is necessary to the valid execution of a will that the testator state that the instrument is his last will. This is called the publication of the will, and is designed to show that the testator knows the paper is a will and not some other instrument. No particular form of words or acts of publication are prescribed by law. Any communication to the witness, either

by word, act, sign or deed, which makes it certain that the testator means the paper which he signs to be his will is sufficient. It is not essential that the words of publication be uttered at the time of signing the will; they may be made prior thereto, or at the time of execution, if, taken altogether, they show the purpose of the testator to be that the instrument is intended as his last will and testament.

The fact that the will is entirely in the handwriting of the testatrix furnishes conclusive evidence that she understood the contents of the will; and it is well established that, in proving the execution of a holographic will, evidence of its publication may be somewhat relaxed. *Matter of Akers*, 74 App. Div. 461; *Matter of Palmer*, 42 Misc. Rep. 469; *Matter of Beckett*, 103 N. Y. 167; 1 *Underhill Wills*, 280, 281. One reason for this is the fact that the testator by writing the will must surely know its contents and assures considerable consideration and deliberation, and establishes that no fraud was perpetrated in substituting some other paper, as might be possible had the will been written by another person. It has been held, "A substantial compliance with the statute is sufficient. It requires no literal adherence to its own words and phrases, but permits the necessary information to be given in any manner adequate to the desired result. Where the testator cannot speak at all, or only with difficulty, he may communicate his knowledge by signs or by words to some listeners unintelligible. But if he does that in a manner capable of conveying to the minds of the witnesses his own present consciousness that the paper being executed is a will, that must necessarily be sufficient." *Coffin v. Coffin*, 25 N. Y. 9; *Lane v. Lane*, 95 id. 494; *Matter of Beckett*, 103 id. 174; *Darling v. Darling*, 22 Hun, 85; *Matter of McGraw*, 9 App. Div. 372. It was held sufficient execution where the will was read to the testator and approved and signed by him. *Burk's Will*, 2 Redf. 239.

It was held in *Robbins v. Robbins*, 50 N. J. Eq. 742, and

Hildreth v. Marshall, 51 id. 241, that, where the testator told two persons he intended to make his will at an indicated time and specified place, and asked them to attend there and act as witnesses to his will, and they met the testator at the appointed time and place and the testator signed his will, after which he handed it to the witnesses, who also signed it, though the testator said nothing at the time of the execution as to the nature of the instrument, the publication was good.

When we consider the conversation the testatrix had with the witnesses at and prior to her signing the will and the significant fact that, after signing the will, she handed the pen to one of the witnesses, and he immediately signed the will as a witness and then handed the pen to the other witness, the due publication is established.

The subscribing witnesses testified to the execution of the will with positiveness and candor. Their testimony fully establishes that all the legal requisites were complied with. They are entirely disinterested, and I believe are entitled to full credit. I find the will was signed and executed according to statute and is entitled to probate.

Probate decreed.

Matter of Transfer Tax upon the Estate of JOSEPHINE E. S.
PORTER, Deceased.

(*Surrogate's Court, New York County, March, 1910.*)

STATUTES—ENACTMENT AND VALIDITY IN GENERAL—PRESUMPTIONS TO SUPPORT.

TAXES—INHERITANCE AND TRANSFER TAXES: EXEMPTIONS—EXEMPTION ARISING FROM APPLICATION OF FUNDS BY EXECUTOR: ASSESSMENT—APPRAISAL—DEDUCTION OF COMMISSIONS—DEDUCTION OF DEBTS.

The Surrogate's Court of New York county being a court of first instance will assume the constitutionality of a legislative enactment which has not been declared unconstitutional by the appellate courts.

Since the passage of the amendment to section 220 of the Tax Law contained in chapter 310 of the Laws of 1908, an executor may not elect to appropriate assets in the State of New York to the payment of legacies that are exempt or taxable at the minimum rate, leaving the payment of legacies that would be taxable or taxable at a higher rate to be paid from assets without the State.

In appraising the estate for taxes in such a case there should be deducted the amount of debts due the creditors in this State; also such an amount of the debts due creditors not domiciled in this State, funeral expenses and commissions, as should bear the same proportion to the whole amount thereof as the net New York assets (after all deductions are made for debts owing to resident creditors, New York commissions and New York administration expenses) bear to the entire or gross estate wherever situated.

Appeal from an order fixing the transfer tax.

Thomas Mills Day, for executor; Edward H. Fallows, for State Comptroller.

THOMAS, S.—By chapter 310 of the Laws of 1908 the Transfer Tax Law was amended by the addition to section 220 of a new subdivision, which reads as follows:

"Whenever the property of a resident decedent or of a non-resident decedent within the State, transferred by will, is not specifically bequeathed or devised, such property shall, for the

purpose of this article, be deemed to be transferred proportionately to and divided pro rata among the general legatees and devisees named in said decedent's will, including all transfers under a residuary clause in such will." Tax Law, subd. 3, art. 10, as incorporated in the Consolidated Laws.

On May 30, 1908, or twelve days after this amendment went into effect, the decedent died a resident of the State of Connecticut. She left a will which contained the following provision:

"Second. I give and bequeath to my granddaughter Agnes Sheffield Porter the sum of one hundred fifty thousand dollars (\$150,000), and to my granddaughter Josephine Earl Porter the sum of one hundred fifty thousand dollars (\$150,000), provided that each of my said grandchildren shall live to reach the age of twenty-one (21) years. Said amounts are to be paid at the discretion of my executor, either in cash or in such securities of my estate at their market value at the time of payment as my executor may select."

In subsequent parts of her will the decedent directed the above bequests to be held by the Connecticut Trust and Safe Deposit Company, her executor and trustee, in trust for her said granddaughters until they should respectively reach the age of twenty-one years, when the granddaughters were to receive the fund, the devolution of which in case of their death before that age was limited in a certain manner not now material. She bequeathed money legacies to thirty-eight legatees of the five per cent. class, all of whom, with one exception, reside outside of this State, and she gave her residuary estate in equal parts to her two granddaughters. She also directed that "all succession, legacy, inheritance and transfer taxes" should be paid out of her general estate. The decedent owned no real property in this State, and her entire personal estate amounted to \$384,744.84, whereof securities of the appraised value of \$66,662.80 constitute the property within this State.

The executor filed with the appraiser affidavits showing that it had elected to apply the securities in this State to the payment of the legacies given in the clause of the will above quoted to the decedent's granddaughters, and that it had transferred such securities to itself as trustee for that purpose; but the appraiser reported the estate in New York as transferred proportionally to and divided pro rata among all the legatees named in the will, and from the order made upon his report the executor appeals.

One of the grounds of the appeal raises the question of the constitutionality of the amendment. This court being a court of first instance will assume it to be constitutional. The purpose of the amendment plainly is to take from executors the power which under some circumstances they had before its enactment, and especially foreign executors, to defeat the tax or reduce its amount by electing to devote particular parts of the estate to the satisfaction of particular legacies. The exercise of this power, besides diminishing the revenue of the State, was productive of much confusion and delay in the final adjustment of the tax, for executors were often slow to make their election, and not infrequently they failed to do so until after the appraiser had filed his report and after the order fixing the tax had been made. The amendment will tend to facilitate and simplify the administration of the law. The present case being within its purview the property will "be deemed to be transferred" in the manner prescribed by it, unless such property is embraced in the exception now to be considered.

The amendment contains an exception excluding from its operation "property specifically bequeathed or devised." It is contended by the executor that when it selected the securities in New York to pay the two legacies in question, such securities became in effect as much "specifically bequeathed" as if named directly in the will, and this by virtue of the discretion which the will gave to the executor to pay such legacies either

in cash or in securities belonging to the decedent's estate. With this I do not agree. The will fixed the character of the legacies as general legacies. The authority given to the executor was merely a discretion as to the manner of payment, and it did not and could not change the character of the legacies or convert the securities selected for their payment into property "specifically bequeathed or devised."

The executor also appeals from the refusal of the appraiser to allow any deduction on account of debts presumably owing to creditors without the State, funeral expenses and administration expenses, including commissions in respect to property without the State. It is now insisted on behalf of the State Comptroller that as debts owing by a non-resident decedent to New York creditors must be deducted *in toto* from New York assets, under the decision in *Matter of Grosvenor*, 124 App. Div. 331, *affd.* 193 N. Y. 652, no further deductions are allowable except for New York administration expenses and New York commissions. No decision refusing *in toto* the deductions in question has yet been made. On the contrary, it has been held that such deductions are to be made upon a *pro rata* basis. In the *Estate of Alice Key Browne*, my memorandum, published in the *New York Law Journal* of May 25, 1907, reads as follows:

"*Estate of Alice Key Browne*—The appeal was taken in time. The appraiser acted correctly in *pro rating* debts due to creditors not domiciled in this State and funeral expenses (*Matter of Doane*, N. Y. Law Journal, March 12, 1903). He was also correct in *pro rating* the annuities or gifts of income which are directed by the will to be paid generally out of the income of the residuary estate given by the will to the executor in trust. The executor, however, is entitled to have all expenses of administration, including the commissions allowable to him in the domiciliary jurisdiction, also *pro rated*, and for this purpose the matter will be remitted to the appraiser if counsel are unable to agree upon the amount. Settle order on notice."

The executor appealed from each and every part of the order made pursuant to this memorandum, except the part which adjudged the appeal to have been taken in time. In the Appellate Division the order was affirmed without opinion (*Matter of Browne*, 127 App. Div. 941), and in the Court of Appeals (195 N. Y. 522) the appeal was dismissed with the following memorandum:

"Per curiam—While we would have no difficulty in disposing of this appeal by affirming the order on the merits if the appeal was properly before us, we are of the opinion that the order appealed from is interlocutory, and therefore the appeal must be dismissed, with costs."

The exact basis upon which the pro rata allowances should be made was, however, not litigated or determined in that case. In view of the fact that the rule established in the *Grosvenor* case, *supra*, for the deduction of New York debts is very liberal to the estates of non-resident decedents, I think the deduction to be made for debts owing to non-resident creditors, mortuary expenses, commissions on property without the State and other administration expenses in respect to such property, should be in the proportion which the net New York estate (after all deductions are made for debts owing to resident creditors, New York commissions and New York administration expenses) bears to the entire or gross estate, wherever situated. The trustee's commissions, which are the subject of the fourth ground of appeal, will be allowed pro rata to the extent here indicated. As to the debts alleged to amount to \$3,302.58, it does not appear whether they are owing to domestic or foreign creditors, and unless the parties agree as to this further proof will have to be taken by the appraiser.

The order is sustained as to the first, second and fifth grounds of appeal, and as to the third and fourth it is reversed to the extent indicated above. Settle order on notice.

Decreed accordingly.

Matter of the Final Judicial Accounting of WILLIAM BEDELL as Surviving Executor of the Last Will and Testament of GILBERT T. PEARSALL, Deceased.

(Surrogate's Court, Dutchess County, March, 1910.)

RECORDING WRITTEN INSTRUMENTS AND NOTICE OF TITLE: SUFFICIENCY OF RECORD TO CONSTITUTE NOTICE—RECORD AS DEED OF ABSOLUTE DEED INTENDED AS MORTGAGE: RECORD OF INSTRUMENTS AS AFFECTING PRIORITY—BONA FIDE PURCHASER IN GENERAL—WHO IS A "SUBSEQUENT PURCHASER" IN GENERAL.

One who takes a conveyance of the interest of a devisee in real property in satisfaction of an antecedent debt is not a bona fide purchaser for value, nor protected by the recording act against prior mortgages of the same interest which were improperly recorded in the deed books.

Proceeding upon the final judicial accounting of an executor.

Milton A. Fowler, for executor; Frank B. Lown, for Anna T. Pearsall; George Card, for Elizabeth P. Hicks; Morschauer & Hoyrardt, for William H. Pearsall and Lavergne H. Spence; Stephen G. Guernsey, for Mabel Knapp Doty.

HOPKINS, S.—Under the will of Gilbert T. Pearsall, deceased, which was proved in this court February 19, 1891, after disposing of his personal estate he gave his wife the use and income of all his real estate for life. He then directed that "after the death of my wife, Jane Ann Pearsall, I order and direct my executor to sell and dispose of all my real estate with the consent of a majority of my children living at that time and the moneys arising from the sale of the above real estate to be divided equally among my children, etc."

The wife died in 1909. The surviving executor sold the real estate, realizing nine thousand one hundred dollars there-

from, and brings the proceeds into court upon this accounting for the distribution under the provisions of the will.

It is conceded that the said proceeds are to be divided into five shares, one of which passes, under the will, to a son, William H. Pearsall. This son transferred his interest in the estate of his father by four different instruments, viz.:

First. He made an assignment of such interest to Anna T. Pearsall, his sister, dated November 13, 1893, as collateral security for the payment of two promissory notes; one for \$200, dated July 8, 1891, with interest from date, and one for \$100, dated July 7, 1893, with interest from date.

Second. An assignment to Jane Ann Pearsall, his mother, dated November 13, 1893, as collateral security for a promissory note of \$100, dated May 1, 1891, with interest from date, and another note dated August 7, 1893, upon which there was due \$505, with interest from date; also for the amount of \$100 and interest from September 14, 1892, being the balance then due upon a note of \$1,300, besides the sum of \$25 balance due on store rent.

Third. An assignment to Alice G. Pearsall, his wife, dated November 14, 1893, for the consideration of \$242.40, purporting to assign all the first party's interest referred to in the two former assignments, but subject thereto. All of these assignments were recorded in the Dutchess county clerk's office in the record of deeds. Subsequently and on May 18, 1897, said Pearsall conveyed by deed to his son-in-law, Lavergne H. Spence, all the title and interest of himself and his wife, Alice G. aforesaid, in all the real estate owned by his father, for an express consideration of \$571, which deed was duly recorded in said clerk's office. Mr. Spence now claims that he is the absolute owner of the share of William H. Pearsall in the proceeds of the sale of the testator's real estate, by virtue of his deed, for the reason that he had no actual or constructive notice

of the existence of the previous assignments, on account of their having been recorded in the records of deeds, instead of record of mortgages, and that he was a bona fide purchaser for value and is protected by the recording act. His testimony discloses that the deed was given to him in satisfaction of an antecedent debt, that is, for money loaned William H. Pearsall some time before the transfer. Such being the case, he was not a bona fide purchaser for value and, even having no notice of the previous assignments, he does not come within the protection or meaning of the recording act; and, therefore, the assignments to Anna T. Pearsall and Jane Ann Pearsall are superior to, and take precedence of, the conveyance made to him. *Young v. Guy*, 87 N. Y. 462; *Howells v. Hettrick*, 160 id. 308.

As was said in *Ten Eyck v. Witbeck*, 135 N. Y. 49: "If the rejection of the later conveyance will leave the grantee in the same position, with respect to his property rights, as he occupied before its execution and acceptance, he cannot be permitted to aid, however innocently, the fraudulent grantor in his effort to defeat a prior conveyance by him of the same lands." The facts in the case at bar come within this rule. William H. Pearsall had nothing that he could honestly convey to Spence, in view of the former assignments to his sister and mother, unless his share of the proceeds of the sale of testator's real estate was more than their claims. He knew this, and, if he intended to give Spence an absolute title, he then deliberately intended to defraud his mother and sister, otherwise, the deed was only intended as collateral security for the amount due Spence. If the grantor intended to commit a wrong, his grantee, in justice and equity, should not be permitted to profit by it. As between these claimants, I think it was not necessary to record the assignments or the deed. William H. could convey no absolute title to his interest, except such as might be, and eventually was, defeated by a sale under the power given the executor in the will of the deceased.

It is my opinion, and I therefore conclude, that the share of William H. Pearsall should be distributed among the holders of the various conveyances, according to priority, and that the claim of Spence, under his deed, is subject and subordinate to the liens and claims made under the assignments to Anna T. and Jane Ann Pearsall.

Decree to be entered on three days' notice by either party.

Decreed accordingly.

Matter of the Judicial Settlement of the Accounts of MARTHA A. SILLIMAN, as Substituted Trustee Under the Last Will and Testament of WILLIAM INGRAM, Deceased.

(Surrogate's Court, Rensselaer County, March, 1910.)

TRUSTS—COMPENSATION—HALF COMMISSIONS—UPON INTERMEDIATE ACCOUNTING; PROPERTY FORMING BASIS OF ALLOWANCE.

One appointed by the surrogate to execute the unexecuted trust upon the death of a testamentary trustee is entitled, upon the first intermediate accounting, to one-half commissions upon the principal of the estate.

Proceeding upon the judicial settlement of the accounts of a substituted trustee.

William W. Morrill, for petitioner and trustee; Henry A. King, guardian of Jennie P. Ingram, by Henry J. Speck, his attorney; Timothy J. Quillinan, special guardian for Jennie P. Ingram.

HEATON, S.—This is the first intermediate accounting by the trustee appointed by this court to execute the unexecuted trusts created by the will of William Ingram, deceased. The original trustee died, and about five years ago the present trustee was appointed and received from the representatives of the de-

ceased trustee, after an accounting in this court, a principal estate of about \$170,000, practically all in securities, and some income not paid over which had accrued from the death of the trustee to the date of the decree.

Among other questions, this one is raised: Is the trustee now entitled to commissions at one-half rates upon the principal of the estate?

If this were an intermediate accounting by the first trustee, and the fund had been received from the executor of the estate of the creator of the trust, the trustee would be entitled to compensation based upon the value of the principal of the estate received, computed at one-half rates. *Robertson v. de Brulatour*, 188 N. Y. 301; *Olcott v. Baldwin*, 190 id. 99. But the accounting trustee here is one appointed by the surrogate to succeed a former trustee. Does that fact require the application of a different rule in fixing compensation?

The recent decision in *Whitehead v. Draper*, 132 App. Div. 799, has been cited as establishing that a different rule has been applied. But in that case, after the death of the original trustees, their successors were appointed by the Supreme Court; and there seems to be a special provision made for granting compensation to such a trustee, who "shall be entitled to such compensation for his services by way of commissions as the court appointing him shall determine, which shall in no case exceed that now allowed by law to executors and administrators." *Pers. Prop. Law*, § 20.

This provision was not repealed when the addition to section 3320 of the Code of Civil Procedure was made, making a general rule for the allowance of commissions to all trustees; and, from the fact that this apparent inconsistency was not discussed in the opinion in the *Whitehead* case, it would seem that it was not called to the attention of the court. However that may be, it could hardly be said that the rule laid down in the *Personal Property Law* for fixing compensation of a trustee appointed by

the Supreme Court as its agent to execute a trust which had devolved upon it should be applied by the Surrogate in allowing commissions to a trustee appointed by him to execute an unexecuted trust.

Prior to 1904, trustees were allowed commissions in Surrogate's Court under the authority of sections 2802 and 2810 of the Code of Civil Procedure which applied the same rule to the granting of commissions to trustees, both on intermediate and final accounts, as were laid down in section 2730 to govern allowance of commissions to executors and administrators upon final accountings. In that section (2730), commissions could be allowed only for receiving and paying out "sums of money." Consequently we find a number of decisions which limit commissions of trustees to a computation made upon money actually received in cash or realized from converting securities into money in the course of administration. It began soon to be apparent that the result of this rule was to work an injustice to trustees who might manage an estate with great ability and care for many years with little or no compensation. The next result was the injustice to the estate itself, because some trustee, in order that he might not be deprived of adequate compensation, converted good securities into money and reinvested the proceeds, in most instances not improving the quality of the investments or the rate of income.

Apparently to meet these difficulties, in 1904 there was added to section 3320 of the Code of Civil Procedure an express provision for the allowance of commissions to trustees, based upon receiving and paying out all "sums of principal," the provision relating to trustees differing from the one relating to executors and administrators by changing "sums of money" to "sums of principal."

Following this change of language and intention on the part of the Legislature, we have the cases of *Robertson v. de Brulatour*, 188 N. Y. 301, and *Olcott v. Baldwin*, 190 id. 99, which

construe the new provision and hold that trustees may, on an intermediate accounting, have commissions at one-half rates computed upon the entire principal of the estate received, even when it had just been subjected to full commissions upon the accounting of the same persons as executors.

Upon the death of such a sole trustee, the trust vests in the Supreme Court (Pers. Prop. Law, § 20; Real Prop. Law, § 111); and the surrogate may appoint a trustee to execute the unexecuted trust. Code Civ. Pro., § 2818. The estate of the deceased trustee can receive no commissions for paying over to the successor, because the trust property has vested by operation of law in the Supreme Court, and the same passes by operation of law to the new trustee upon his due appointment. Such new trustee must necessarily receive the property in the same condition in which it was left by his predecessor. Unlike the original trustee, he cannot require its payment to him in cash, nor, can he refuse to accept any particular security, since there is no one in office who can convert the property into money; and yet we have seen that he who could require the cash need not do so, but can still have his commissions, while he who must accept the securities, it is argued, cannot have commissions thereon. The second trustee receives the estate, administers it for a long period of time and, upon the termination of the trust, distributes the fund. It is claimed that his compensation for all services and responsibility in caring for the estate and paying it over can be computed only upon the money actually received and the value of the principal so turned over at one-half rate. This compensation upon a \$50,000 estate managed for ten years would be at the rate of \$34.50 a year, payable at the end of the trust term. The application of this rule would result in many trustees yielding to the temptation to sell first class long-term investments, with the result that the loss to the estate in brokerage, income, and premiums would

be added to the amount of the extra commission, and the estate, instead of being conserved, would be depleted.

The description of a trustee as a "substituted" trustee is a mere convenience of expression, and is not found in the law. Section 2818, Code of Civil Procedure, does not provide for the appointment of a "substituted" trustee, but of a trustee to succeed another trustee. Section 2514, subdivision 6, says that "the expression 'testamentary trustee' includes every person * * * who is designated by a will, or by any competent authority, to execute a trust created by a will."

Section 3320, Code of Civil Procedure, does not divide trustees into two classes and make one rule for trustees and another for "substituted" trustees, and yet the lawmakers in 1904 well knew that persons appointed as testamentary trustees must necessarily die and their successors be appointed.

As has already been shown, the attempt of the courts to protect a trust estate from paying several half commissions in exceptional cases will nearly always result in a loss instead of a gain. The extra burden of commissions based upon principal received is not excessive. For example: The first trustee receives one-half commissions and dies; the second trustee distributes the estate and receives full commissions—result, one commission and a half for the services of two trustees covering a period of years. Suppose we carry it one step further and say that the second trustee dies and the third trustee distributes—result, two full commissions for services of three trustees, covering a probable period of thirty years.

A construction allowing compensation based upon principal converted into money would enable a trustee by a trick and a device to nullify the benefits of the rule and not only collect the same amount in commissions but still further deplete the fund by losses always occasioned by a change in investments.

For these reasons it would seem to be clear that the provisions of section 3320, Code of Civil Procedure, should be con-

strued as applying to a second, or subsequent, or substituted trustee, appointed by the surrogate, in the same manner that it has been held in the two Court of Appeals cases it applies to the first trustee appointed by the testator, as to commissions for receiving the trust estate.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of LEVI HUSSEY and ALBERT D. GANTZ as Executors of the Estate of ALBERT B. HUSSEY, Deceased.

(Surrogate's Court, Kings County, March, 1910.)

EXECUTORS AND ADMINISTRATORS—DISTRIBUTION AND DISPOSAL OF PERSONAL ESTATE—INTEREST ON LEGACIES AND SHARES—DELAY IN PAYMENT.

Legacies payable out of a trust estate upon the death of the life tenant begin to draw interest at the termination of the life estate, although some time may be required to convert the trust estate into cash.

Proceeding upon the judicial settlement of the account of executors.

Meyer Auerbach, for executors; William H. Blain, for Cora M. Crowell et al., legatees; Edwin M. Daniel, for M. and E. Daniel, legatees; Phineas Lewinson, for Helen L. Richardson et al., legatees.

KETCHAM, S.—The will under which the executors are settling their accounts devised the residue in trust to pay the income thereof to the testator's wife for life. It then directed that, upon the death of the wife, certain real estate included in such residue "be sold and converted into money, either at public auction or at private sale." The will then proceeded:

"Fifth. It is my will that from the proceeds of the sale of

the aforementioned real property" (describing the land hereinbefore mentioned) "when the same shall be sold, there shall be paid the mortgage thereon now held and owned by my wife with the interest, and from the residue of such proceeds and from my personal assets all of which shall be converted into money upon the death of my wife * * * I give and bequeath the following mentioned pecuniary legacies, all of which shall vest in interest in the legatees respectively, upon my death, to wit:" (Here follow numerous general legacies, amounting to \$15,000).

By other provisions of the will there was a gift to persons named of the balance of the residuary estate after the payment of the general legacies.

The lands were brought to sale about ten months after the death of the wife. In the meantime, the accountants received \$1,399.10, rents of the lands aforesaid. At the death of the wife there was in the hands of the trustees personalty of a substantial amount, which was applicable to the general legacies. This was retained by them until after the sale, and the account shows the receipt of interest on bank balance after the death of the life tenant.

The claim of the general legatees that their legacies bear interest from the cessation of the life estate must be accepted. To deny this claim would augment the estate of the ultimate remaindermen by an amount of rents and interest actually received while the real estate awaited sale, and make a result which would be intolerable; for by no construction is it possible that any part of the income of the general remainder belonged to them.

"When in legal contemplation a legacy is due, the right thereto carries with it, even though actual payment is then impossible, the right to interest until such actual payment, and it is quite immaterial whether the assets of the estate have been fruitful or unproductive." *Hoffman v. Pennsylvania Hospital* 1 Dem. 118.

This rule is ordinarily applicable to legacies for the payment of which no time is assigned by the will and which, at common law, bore interest from the expiration of a year after the death of the testator, and which, by statute, are now payable after the expiration of one year from the time of granting letters testamentary or of administration. Code Civ. Pro., § 2721. But the same rule is equally appropriate to a legacy made payable in an event which may come to pass after the year prescribed by statute. Hence, the sole inquiry, upon the answer to which the interest date depends, is, when in legal contemplation were the legacies in question payable?

This does not involve examination as to whether, at the death of the life tenant, these legacies were capable of actual payment. It assumes that an appreciable time might properly elapse before real or personal property could be converted into a form adapted to the discharge of the legacies.

To adopt any other time than the moment that the life estate ceased would make the rights of the legatees dependent upon casual and indeterminate facts, such as the zeal or sloth of the trustees, the resistance of debtors of the estate or the vagaries of the investment market. The law has always made use of every device of construction to save the interest date upon legacies from the shifting accidents of administration.

It may be said that the event contemplated in the will at bar as the event upon which the legacies became due was an actual sale of the real estate, and in this regard the words directing the payment of the legacies out of the proceeds of the lands "when sold" may be quoted. But like words have been held to effect the time of the actual solution of the legacies and not the time when they became due in legal contemplation. *Hutchin v. Manning*, 1 Ves. 366, approved *Dixon v. Storm*, 5 Redf. 419, 422; *Wood v. Penoyre*, 13 Ves. 326, approved *Wheeler v. Ruthven*, 74 N. Y. 428.

The precise question here involved has been disposed of in

this court by a decision which is held to be controlling. *Matter of Runk*, 55 Misc. Rep. 478.

The record of the will considered in the case last cited has been examined and is found to coincide peculiarly with the will at bar.

If the case of *Wood v. Penoyre*, *supra*, be read with the attention which its approval by the Court of Appeals demands, its reasoning will be found to constrain the present result. Other decisions, upon varying facts, indicate that, whether the payment of the legacy be postponed by the will or not, interest is payable, not from the time when the estate is so converted that the legacies may be actually paid therefrom, but from the time when the legacies become legally due, though not practically capable of payment. *Wheeler v. Ruthven*, 74 N. Y. 428; *Matter of Rutherford*, 196 id. 311; *Dixon v. Storm*, 5 Redf. 419; *St. F. X. Coll. v. Doherty*, id. 526.

Matter of Schabacker, 46 Misc. Rep. 219, does not actively support the views herein relied upon; but there the source, method and time of payment were to be derived from a provision by which, at the end of the life estate, the land was devised over to the executor in trust "with power to sell and convey the same and divide the proceeds" among certain legatees and to pay the balance to a person named.

Mr. Justice Marcus, then surrogate, upon these facts, said: "The time for the conversion of the property has, therefore, been left indefinite by the will, and no particular time specified for the performance of the trust. It, therefore, seems that it was within the contemplation of the testatrix that the property must be sold and that it was out of the moneys derived from such sale that the legacies were to be paid (and in fact no other assets existed), and since no time was specified for the performance of the trust a reasonable time, of course, would be allowed.

"It is urged that since the power of sale is given for the purpose of paying the legacies, equity will regard the land as actu-

ally converted, and, therefore, interest attaches to the legacy, the same as though the property had actually been sold immediately upon the death of the testator. The rule ought not to be applied to this case, since 'to divide the proceeds thereof' must mean an actual sale, and the fiction of equitable conversion ought not to apply, particularly in view of the absence of any claim that the trustee refused to sell or his good faith questioned."

This language would fairly distinguish the case cited from the case at bar. The controlling feature there was that no equitable conversion at the end of the life estate could be found, since the will left the time of the conversion indefinite. Here the will contained a peremptory direction for sale and conversion upon the death of the wife, and, of course, an equitable conversion was wrought.

The intimation of the opinion quoted is clear that, if the "fiction of equitable conversion" could have been applied, another result would have been accepted. That opinion proceeded upon the finding that "it was out of the money derived from the sale that the legacies were to be paid" and supported this conclusion with the fact that "no other assets existed;" while in the case under inquiry there were, at the death of the life tenant, personal assets which were applicable in law and must be presumed to have been actually available for the immediate discharge of a large proportion of the legacies. The case cited is regarded as limited by its own facts.

In the adjustment of this account the legacies in question must have interest at the legal rate from the cessation of the particular estate.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of LUKE D. STAPLETON, as Executor of the Last Will and Testament of JOHANNA BLOHM, Late of Kings County, Deceased.

(Surrogate's Court, Kings County, March, 1910.)

WILLS—INTERPRETATION AND CONSTRUCTION—DESIGNATIONS AND DESCRIPTIONS OF PROPERTY, FUNDS, ETC.—PARTICULAR TERMS OF DOUBTFUL MEANING—CHARGES MADE AGAINST LEGATEE.

A gift to a legatee of one-third of the testatrix's cash, bonds and mortgages, "less the sum of three thousand dollars which sum of three thousand dollars I charge him in full satisfaction" of certain advances previously made, cannot be taken as establishing an indebtedness in favor of the testatrix so as to cut down a gift to the same legatee in a later part of the will, where the testatrix leaves no cash, bonds and mortgages from which said amount of three thousand dollars can be deducted.

Proceeding upon the judicial settlement of the account of an executor.

Seelman & Farley, for executor and trustee; H. Harvey Harwood, for Robert T. Blohm; G. L. Simonson, for C. Levick, a legatee; Thomas J. Farrell, for Johanna M. B. Cook, a legatee.

KETCHAM, S.—The will under which the trustee accounts contained, in the seventh paragraph of the will, a devise in trust, among other things, to pay one-third of the rents, issues and profits to the son of testatrix, Robert T. Blohm, during his lifetime, for his support and maintenance.

An earlier provision in the will was as follows:

"Fourth. I give and bequeath one-third (1-3) of all my cash, bonds and mortgages, less the sum of three thousand dollars (\$3,000), which sum of three thousand dollars (\$3,000) I charge him, Robert T. Blohm, in full satisfaction for all moneys at any time advanced to him by my husband or myself, to the Nasseau Trust Company of Brooklyn, in trust, nevertheless, for the following purposes:

"To invest and reinvest the same in bonds to be secured by first mortgages on New York city real estate, to collect the interest thereon, and to pay all of said interest, less its commissions, to my son, Robert T. Blohm, semi-annually, for his support and maintenance during the term of his natural life. * * *"

The testatrix left no bonds and mortgages, and no cash, except a sum which was less than the amount of her debts.

She intended that her gift to her son, in the fourth paragraph, should be, not one-third of her cash, bonds and mortgages, but one-third of her cash, bonds and mortgages, less the sum of \$3,000.

This cannot be regarded as the basis for a finding that the son was in fact indebted to her in the sum of \$3,000, or any sum. A testator cannot create an indebtedness to himself by saying that one exists, nor is it within the province of construction to decree that a person is the debtor of the estate, whatever may be the assertion of the will on the subject.

Hence, notwithstanding the description or qualification which may be annexed by the testator to a sum used by him as a means of ascertaining the amount of his proposed bounty, the sum so used can only be an arbitrary measure of amount. It has no more value in the will than if it were mentioned as a sum of money simply. And if the only office of the words relative to this \$3,000 was to ascertain the *quantum* of the gift of cash, bonds and mortgages, it follows that its mere mention for that purpose alone cannot affect or reduce the later provision in favor of the same beneficiary.

The failure of the gift of a portion of the cash, bonds and mortgages affords no reason why Robert T. Blohm should not have the full benefit of the trust in his behalf contained in the seventh paragraph of the will, and the pending account should be settled accordingly.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of WILLIAM BEDFORD, as Executor of the Last Will and Testament of ANNIE E. BRENNAN, Deceased.

(Surrogate's Court, Kings County, March, 1910.)

WILLS—INTERPRETATION AND CONSTRUCTION: TERMS CREATING LEGACIES AND GIFTS OF INCOME, INTEREST, SUPPORT AND RELEASES OF DEBTS—RULES AND IMPLICATIONS—GENERAL DEMONSTRATIVE OR SPECIFIC CHARACTER OF LEGACIES: EXPENSES OF THE ESTATE, CHARGES, ADVANCES AND PAYMENT OF DEBTS AND LEGACIES—RULES AND IMPLICATIONS—IMPLIED LIABILITY OF DEMONSTRATIVE LEGACIES.

A gift by a testatrix to her infant children of her house and lot, coupled with the direction "and from the money which I have in bank to pay off the mortgages against my said house and lot as soon after my death as possible," is to be construed as constituting a demonstrative legacy of such moneys to the extent required for the payment of the mortgages; and, where the fund is inadequate for the purpose and there are no personal assets, the expenses of administration must first be paid therefrom and the balance must then be applied to the purpose indicated.

Proceeding upon the probate of a will.

Coombs & Wilson, for executors; C. Walter Randall, special guardian, for Beaumont infants; William J. Bolger, special guardian, for Charles M. Beaumont and Charles Altenbrand.

KETCHAM, S.—The will requiring construction was in part as follows:

"Second. I give and devise to my two youngest children, Joseph Beaumont and Benjamin Arthur Beaumont, my house and lot, No. 372 Graham avenue, Brooklyn, Kings county, to them, their heirs and assigns forever, and I hereby appoint my said husband to be their guardian during their infancy, and from the money which I have in bank to pay off the mortgages against my said house and lot as soon after my death as possible,

and to pay all taxes and assessments which may hereafter be levied against the same and in consideration thereof and the guardianship of my said children Joseph and Benjamin, that he shall have the use of said house, rent free, during his lifetime."

This provision was followed by three general legacies of money and a gift of the residue to the husband.

This will must be construed as containing a direction that the moneys in bank left by the testatrix at death should be applied to the extinction of the mortgages upon the devised lands. This constituted a demonstrative legacy to the persons named as devisees of such portion of the moneys in bank as might be required to satisfy the mortgages or of the whole of such moneys, if they were less than the amount of the mortgages.

There being no personal estate other than the moneys thus demonstrated as the source from which the specific legacy was made payable, the expenses of administration were necessarily payable from the demonstrated fund and the balance thereof should be applied to the purpose to which it was devoted by the testatrix.

The lands having been sold and the mortgages having been discharged from the proceeds of sale, this balance should now be paid to the guardians of the legatees.

Decree should be submitted accordingly.

NOTE ON DEMONSTRATIVE LEGACIES.

DEFINITION.

A legacy primarily payable out of a particular fund or thing designated in the will, and on the event of the failure thereof, then payable out of the general assets of the estate. *Crawford v. McCarthy*, 159 N. Y. 514.

GENERALLY.

Held to be one of quantity, payable out of a particular fund primarily and out of the general estate of the fund designated proves insufficient. *Church v. Hebard*, 28 App. Div. 549.

A pecuniary legacy, given with a particular security, is a demonstrative legacy and does not fail by the failure of the security upon which it is given. *Fowler v. Willoughby*, 4 L. J. Ch. O. S. 72.

Where testator gave her infant children a house and lot with a direction that from the money in bank, mortgages against the house should be paid as soon as possible after her death, it was held that it was a demonstrative legacy of such money to the extent required to pay the mortgages, and where the fund was insufficient for the purpose, and there were no personal assets, after payment of the expenses of demonstration the balance of the fund must be applied to the mortgage. *Matter of Bedford*, 67 Misc. 38.

Two elements held necessary: The testator must have intended to make an unconditional gift in the nature of a general legacy, and the fund out of which the same is payable must be indicated in the bequest. *Stephen's Appeal*, 100 Me. 146.

Held both general and specific in its nature; general, because the legatee will not lose his legacy in the event that the fund fail, but will receive it out of the general assets specific, because in case there be a deficiency of assets, it will not be liable to abate with the general legacies. *Graham v. Graham*, 45 N. C. 291.

DETERMINATION OF CHARACTER OF LEGACY.

Depends entirely on intention of testator. *Walls v. Stewart*, 16 Pa. St. 275.

Where a particular fund is named out of which legacy is to be paid, it is generally considered to be demonstrative. *Gidding v. Seward*, 16 N. Y. 365.

But when it appears more in accordance with the intention of the testator such a legacy may be considered as specific. *Matter of Tunney*, 49 Misc. 213.

Or it may be treated as general notwithstanding such a designation. *Newton v. Stanley*, 28 N. Y. 61:

Where a gift of a certain amount of specified property is made out of a large amount of property, such gift is generally held to be demonstrative. *Ives v. Canby*, 48 Fed. 718.

A gift of an annuity payable out of income is a demonstrative legacy. *Pierrepont v. Edwards*, 25 N. Y. 128.

ABATEMENT.

Demonstrative legacies have priority over general legacies so long as the fund lasts upon which they are charged. *Myers v. Myers*, 88 Va. 131.

Are subject to abatement in case the residuary estate and the general legacies are insufficient to pay the debts in full. *O'Day v. O'Day*, 193 Mo. 62; *Florence v. Sands*, 4 Redf. 206.

Where charged on a particular fund, they abate rateably with specific legacies, so far as the fund will extend for their payment. *Florence v. Sands*, 4 Redf. 206.

Where it is necessary to resort to the general fund for payment on account of the total or partial failure of the fund upon which the specific legacies are charged, the legacies are considered as general and must abate pro rata with other general legacies. *Matter of Warner*, 39 Misc. 432, 3 Mills Surr. 349.

As between themselves, demonstrative legacies abate pro rata where the fund on which they are charged is insufficient to pay them all in full and there is a deficiency of assets. *Dunn v. Reneck*, 40 W. Va. 349.

Matter of the Judicial Settlement of the Account of FREDERICK M. BOLLES, and MORTON TRUST COMPANY, as Executors of the Last Will and Testament of WILLIAM H. H. HULL, Deceased.

(Surrogate's Court, Kings County, March, 1910.)

EXECUTORS AND ADMINISTRATORS—COMPENSATION—PARTICULAR SERVICES AND RATE OF COMPUTATION OF AMOUNT OF COMMISSIONS—COMPUTATION OF AMOUNT OF ESTATE—WHAT ARE RECEIPTS AND PAYMENTS.

Where securities of a testator pledged at the time of his death as security for his debts were sold by order of the executors and the proceeds were applied to the payment of the debts and the surplus paid to the executors, they are entitled to commissions upon the gross proceeds of sale and not merely upon the surplus remaining after satisfaction of the debts.

Proceeding upon the judicial settlement of the account of executors.

Winthrop & Stimson (Albert W. Putnam, of counsel), for executors; Roswell S. Nichols, for legatees; Jacob I. Bergen, special guardian.

KETCHAM, S.—The accounting executors found upon taking office that their testator had pledged certain securities, in one case to a bank to secure a loan made to him by the bank and, in another, to a firm of stockholders to secure to them the repayment of sums advanced by them in the purchase of the securities on margin for his account.

The executors directed the bank as well as the brokers to sell the securities thus held by them respectively; and, upon the sale so directed there was paid to the executors by the pledgees the difference between the proceeds of sale and the sums which the decedent's estate owned to the pledgees. The sum realized from the sales was \$117,345; the amount of the indebtedness of the estate was \$97,446.07; and the balance paid to the executors was \$19,898.93.

Are the executors' commissions to be calculated upon the proceeds of sale or upon the sum received by them in settlement with the pledgees?

The transactions of the decedent have been called pledges, for they could have no other name or nature. No one will doubt that the contract with the bank was a pledge; and it is equally plain, upon authority, that the arrangement with the brokers was of the same character. *Content v. Banner*, 184 N. Y. 121.

Hence, the decedent retained ownership of the securities; his representatives succeeded to that ownership; and his estate was indebted to the pledgees in the sums for which they held the obligations of the deceased. Under every view which the quality of a pledge permits, the executors receive the gross proceeds of sale and must have commissions thereon, when the subject of the pledge has been sold by their directions and their debt has been paid from the proceeds.

The pledgees made these sales not in the exercise of the right of disposition secured to them by the contract of pledge, but solely as the agents of the executors; and their custody of the proceeds at the moment of their application to the debts, respectively, was the possession of their principals.

Cases which bear upon the discussion, though not always directly, are as follows: *Cox v. Schermerhorn*, 18 Hun, 16; *Smith v. Buchanan*, 5 Dem. 169. In the cases of *Baucus v. Stover*, 24 Hun, 109, and in *Matter of Fulton*, 30 id. 259, *Cox v. Schermerhorn*, *supra*, was distinguished upon grounds which indicated that the commissions were allowable upon the gross proceeds of sale whenever the estate was indebted for an amount to which the proceeds were in part applied.

Under statutes with respect to the allowance of commissions, which are in substance like section 2730 of the Code of Civil Procedure, commissions have been allowed in several States upon circumstances practically parallel to those here presented. *Huddleston, Adm., v. Kempner*, 87 Tex. 372; *Wolf's Estate v.*

Wolf, 81 S. W. Rep. 90; Kiddle v. Mammond, Harper S. C. Eq. 229; Estate of Pease, 149 Cal. 167; Elder v. Whittemore, 51 Ill. App. 662.

The commissions must be calculated upon the gross proceeds of sale in the two transactions herein set forth.

Decreed accordingly.

Matter of the Probate of the Last Will and Testament of
CHARLES DEAN BALDWIN, Deceased.

(*Surrogate's Court, Kings County, April, 1910.*)

WILLS—THE TESTAMENTARY INSTRUMENT OR ACT—EXECUTION OF WILL—IN
GENERAL—PRESENCE OF WITNESSES—PUBLICATION OR TESTAMENTARY
DECLARATION.

Where as to one of the subscribing witnesses to a will drawn upon a printed blank there was a compliance with the statutory requirements, and thereafter the testator presented the paper with his signature upon it to his brother, the other witness, and asked him to witness his signature, which he did, but there was no declaration then that the instrument was a will, nor any circumstance from which such a declaration could be implied; and where after remaining together about an hour they went to luncheon together and at the table the testator told his brother that the paper was his will, to which the brother made no reply and did not again see the paper, the request previously made was not exhausted at the moment of its utterance but reached forward and joining itself to the declaration when made validated the execution of the instrument.

Affirmed 142 App. Div. 904.

Proceedings upon the probate of a will.

Elliott, Jones & Fanning (Edward J. Fanning, of counsel),
for proponent; Floyd Martin Sheffield (William Murray, of
counsel), for contestants.

KETCHAM, S.—The propounded paper was presented to each
of the subscribing witnesses separately, and whatever took place

as to its execution in the presence of one was not within the observation of the other.

In the case of one witness there was a compliance with the statute.

The decedent presented the paper with his signature upon it to the other witness, who was his brother, and asked him to witness his signature, which was done. There was then no declaration that the instrument was a will, nor was there any circumstance from which a declaration could be implied.

The decedent then put the paper in his pocket, he and the witness remained together for about one hour, they then went from the place where the witness's signature had been made to luncheon at a restaurant and there, at table, the decedent told the witness that the paper was his will.

Nothing appears to have been said by the witness in reply to the statement that the instrument was a will. The paper was not brought into the view of the witness after it was signed by him. From the time when it was signed by the witness until the decedent said that it was his will the brothers were continuously together.

The instrument was drawn by the decedent upon a printed blank and the witnesses' names were signed at the end of a blank form printed for an attestation clause; but this form was not filled in and was not read by the brother witness, though it was open to his sight. Both witnesses added to their signatures a statement of their residences, but the brother witness' testimony indicates that he did not gather from the statement of his residence that the paper was a will.

A declaration made after the witness has signed may, in certain circumstances, be given the same effect as if it had preceded the signature. Any one of the four essentials of execution may be found in a probate proceeding, although the parties to the ceremony may have departed from the natural sequence enjoined by the statute.

Thus, though it is required that the declaration shall be made by the testator at the time of making his subscription or at the time of acknowledging the same, it is seldom that the two acts literally coincide; and the declaration which either precedes or follows the subscription may comply with the statute.

A witness must sign at the request of the testator; but, though he may have signed in advance of the request, his act in that respect may become his signature made at the testator's request, if the request succeeds the signature.

Where the witnesses have signed in advance of the testator, their signatures may conceivably become an attestation of his subscription, if it be thereafter supplied.

Each of the acts necessary to the testamentary transaction depends for its efficacy upon the due performance of the other acts to which it is related; but the lesson of the cases is that, where there has been a disturbance of their normal order, these acts, if all performed upon the same occasion, shall still be regarded as bearing to one another the same significance as would be accorded them if their natural succession had been observed.

If a witness has signed without either a declaration or a request, but hears both before the testamentary transaction is over, clearly in the contemplation of both testator and witness the declaration and request of one fall into efficient relations with the attestation by the other, and there is a consensus on the part of both that the signature of the witness stands as a token that the will was declared and the signature by the witness was requested.

If, after the belated declaration, the witness should formally announce that his signature was confirmed with the same effect as if it had been made after the declaration, few would doubt that the witness had attested the act of declaration.

What, then, is the difference whether the witness ratifies his act expressly or tacitly? Between a loud and strenuous affirmation that his signature shall stand and the silence by which he

refrains from repudiating it, there is a difference of probative degree, but none in substance. One tends with great force, but the other, nevertheless, tends to show that the witness confirmed his signature and attributed to it the new relation and purpose which the declaration would impose upon it and that the testator at the same time regarded it as an attestation of his own subscription and declaration.

No other meaning could be reasonably derived by either of them, and the law may safely invest the transaction with the character and value which it bore in their contemplation. But no such meaning would necessarily appear, if before the publication the transaction was broken, either by the separation of the actors therein or their distraction from the testamentary business by the intervention of third persons. Hence it has been laid down that the several acts essential to the execution, when dislocated by the parties, may be related to their normal sequence only when all of them occur during the same occasion.

In *Vaughn v. Buford*, 3 Bradf. 78, Mr. Surrogate Bradford said: "The particular order of the several requisites to the valid execution of a testament is not at all material, provided they be done at the same time and as part of the same transaction. What is the same time and the same transaction is a subject of judicial determination, in each particular case, depending upon the facts, and incapable of being governed by any general rule."

The testamentary occasion is not to be bounded by time alone, or to be broken by a change of the place where the transaction commenced; for the persons concerned may well maintain a continuous relation to the ceremony of will making and to each other's acts in that regard, despite the lapse of time or a change in their own location.

The only test which survives is, whether or not the actors remained for a period covering all the acts which they did with respect to the execution of the will in such conscious and recognized relations to each other and to their acts, respectively, that

from first to last the transaction remained open and in suspense between them and whether there was such continuity in their conduct and attitude in the premises that all which they did therein was done "at the same time and at the same transaction."

In *Matter of Dale*, 56 Hun, 169, the execution was held invalid where at the time when the signatures were made no declaration whatever of the testamentary nature of the paper was made, but the testator, several weeks thereafter, and upon a subsequent occasion, informed the witnesses that the instrument which had been subscribed was his will. That there is no controlling parallel between the case cited and the case at bar will probably appear from the opinion, where the result is made to rest entirely upon the fact that the only declaration was made upon a subsequent occasion, several weeks after the witness had subscribed his name.

In the case under examination the request in pursuance of which the witness signed his name, without knowledge of the nature of the paper, was not exhausted at the moment of its utterance. It reached forward into and characterized all that took place while the testator and his brother continued together; and, joining itself to the declaration when made, it became a request to the witness to attest the paper in the character in which it was revealed by the declaration. When at that stage the witness was silent he thereby adopted his signature, already made, and indicated that it was meant by him to stand in attestation of the subscription, declaration and request.

The will is admitted to probate.

Probate decreed.

Matter of the Probate of the Last Will and Testament of
CHARLES FERDINAND HOFFMAN, Deceased.*

(*Surrogate's Court, Kings County, April, 1910.*)

WILLS—INTERPRETATION AND CONSTRUCTION—DESIGNATIONS AND DESCRIPTIONS OF PERSONS, OBJECTS, AND PURPOSES—RULES AND IMPLICATIONS—WORDS DESCRIPTIVE OF A CLASS.

Where a testator, in disposing of the remainder of his estate upon the death of the life tenant, provides that it shall be divided *pro rata* between his legatees named in certain articles of his will; and where, if it be taken to have been his intention by the use of the word "legatees" to indicate the five persons named in his will as such, the result will follow that his bequest will be ineffectual to dispose of his entire estate; and where if he had so intended he could easily have called them by name; and where in another clause providing for abatement of legacies a certain process of proportion was ordained necessarily applicable only to the beneficiaries who survived him, it ought rather to be inferred he intended by "legatees" only those who survived him and thus became legatees in the proper import of the term.

Proceedings upon the probate of a will.

Whitridge, Butler & Rice (Edward T. Rice and Benjamin A. Morton, of counsel), for proponent Margaret Hoffman and for Carolyn Hoffman; Miller, King, Lane & Trafford (Edwin T. Rice and Benjamin A. Morton, of counsel), for the Union Trust Company; Charles W. Dayton, Jr. (D. Cady Herrick, of counsel), for Rosalie A. Avery, Inez Hoffman Spagnola and Joseph L. Bourdette, contestants; J. Brownson Ker, special guardian for infants Grace Hoffman, Bertha Hoffman and Myrtle Hoffman; Clarence P. Avery, appearing in person.

KETCHAM, S.—Reargument has been heard upon one feature of the construction of the will and codicil about to be admitted

* See 65 Misc. Rep. 126—[Rep.]

to probate. Material parts of these instruments are as follows:

"Art. I. I grant and bequeath unto my niece Margaret Hoffman seventy-five thousand dollars (\$75,000).

"II. I grant and bequeath unto my niece Carolyn, or Carrie Hoffman, fifty thousand dollars (\$50,000).

"Both the foregoing legacies shall be held in trust as herein provided in Art. VIII. * * * The income shall be paid only to said legatees respectively. * * * The remainder of their respective legacies shall remain in trust as provided above * * * and in case of the death of either of them without issue, before the death of their aunt Inez Hoffman legatee under Art. IV herein, then the share of such decedent shall in such event revert to her the said Inez Hoffman. And in case either said nieces should die without issue subsequently to the death of their aunt the said Inez Hoffman and prior to the death of their grandmother, Caroline Hoffman, then in such case their respective shares shall in like manner revert to their grandmother, Caroline Hoffman.

"III. I grant and bequeath my plantation commonly known as 'Caroline' Plantation situated in Iberia Parish State of Louisiana, with all appurtenances and belongings thereunto appertaining, unto John Frederick Hoffman.

"Art. IV. I grant and bequeath unto * * * Inez Hoffman, the sum of one hundred and twenty-five thousand dollars (\$125,000) with the proviso that the same shall be placed in trust as herein provided in Art. VIII and the income thereof be paid to herself only. * * * In case of her death without issue and prior to that of her mother, all her interest herein shall revert to her mother. * * *

"VI. I make and appoint my mother Caroline Hoffman residing in the City of New Orleans State of Louisiana, my residuary legatee, the amount to be placed in trust as herein provided in Art. VIII for her sole benefit. * * * At her death, the principal and any accumulated income there may

be, shall be divided pro rata between the legatees named in Articles I, II and IV herein respectively upon the basis of their respective legacies herein and to be subject to the same trust restrictions stated herein appertaining to their several legacies hereunder.

"Art. VII. Should my estate be not found sufficient to realize at least two hundred thousand dollars (\$200,000) to meet the legacy under Art. VI herein, then all other legacies herein * * * shall be scaled and diminished in amount, or if necessary be wholly canceled, in order to make said legacy under Art. VI herein, equal to two hundred thousand dollars (\$200,000) or whatever lesser amount my total Estate may then possibly be—Such scaling to be upon a pro rata basis."

Paragraph 8 contains an appointment of a trustee, with language from which an express trust is to be implied, and an avowal of confident belief that the testator's "legatees hereunder * * * may receive wise counsel and advice on financial matters affecting their interests."

Paragraph 9 contains a gift of personal effects to "Caroline Hoffman, residuary legatee mentioned in Art. VI herein."

The codicil substituted, in place of the gift in article IV to Inez Hoffman, the sum of \$25,000, and provided as follows:

"I hereby devise and bequeath unto my sister Widow Wilhelmina Bourdette residing on Peters Avenue, Sixth District, City of New Orleans, La., the sum of \$35,000 say Thirty-five thousand dollars and to John F. Hoffman now residing on my Caroline Plantation Iberia Parish State of Louisiana the sum of \$10,000, say Ten thousand dollars. And I hereby make these two legatees, upon the death of my mother pro rata residuary legatees under the terms and conditions as set forth in Art. VI herein, as additional residuary legatees.

"The above legacy to John F. Hoffman is in addition to the one in his favor under Art. III herein."

The estate involved is of the value of \$2,300,000.

Caroline Hoffman, named in article VI of the will, Wilhelmina Bourdette and John F. Hoffman, named in the codicil, all died before the testator's death. It was held in the former opinion (*Matter of Hoffman*, 65 Misc. Rep. 126) that, by the death of Caroline Hoffman, the estates of those who would otherwise have taken in remainder upon her death were accelerated; that as to the will there were three trusts for the payment to the beneficiaries thereof, during their several lives, of the income upon \$75,000, \$50,000 and \$25,000, respectively; that the several estates in remainder upon the death of Caroline Hoffman, which by her death were converted into present estates, were separated into as many individual trusts as there were beneficiaries, and that the fund of each of said trusts was designed to be a portion of the residue which should bear to the whole residue the same proportion as the "legacy" so-called of the beneficiary should bear to the aggregate of such primary legacies of money. As to the codicil, it was held that the two general legacies therein contained, of \$35,000 and \$10,000, lapsed and fell into the residue.

The question treated in the former opinion (65 Misc. Rep. 126), with an inadequacy which has provoked this reargument, is, whether, under construction of the will and codicil, the interests in the residue which would have devolved upon these two codicillary legatees if they had survived the testator, were intended, in the event of their death, to pass as a part of the residue to the trusts for the surviving beneficiaries or to become assets, undisposed of, to be distributed according to the laws governing intestacy.

There is little in the situation of the estate as it appeared to the testator to aid a choice between these two interpretations. Under one, the portion of the estate involved would at once devolve upon the next of kin; under the other, it would be divided into as many parts as there might be surviving beneficiaries, each of which parts would reach the next of kin at the end of a designated life.

It will save words if the terminology of the testator be adopted, though at the sacrifice of legal accuracy. Hence, the word "legatee" will be borrowed from the will to indicate the person named in the will or codicil as the intended recipient, either outright or in trust, of a specific sum of money primarily allotted to him; the word "legacy" will be used to denote the interest intended for such legatee in the sum of money specifically allotted to him or to his use, and the term "residuary legatee" will describe such person in his relation to the remainder.

It is argued in behalf of next of kin that the intended gifts to the "residuary legatees" are governable by the standards which would have applied if the testator, instead of indicating as the subject of his proposed gifts of the residue so much thereof as was proportionate to the legatee's primary legacy of money, had defined his intended benefit to each of them from the residue by a specific fraction, of which the amount of the so-called "legacy" was the numerator and the aggregate of all the "legacies" was the denominator. In this regard, it is contended that, where the whole of the "legacies" of specific sums was \$195,000, and the attempted legacy in a given case was of \$35,000, the will should be read as if the words were, "I give, of the residue, 35/195."

Upon this reading, the claim is founded that the portions of the residue which would have been held in trust for the two legatees named in the codicil, if they had outlived the testator, are not disposed of by the will and must fall into intestacy.

Again this, it is insisted (1) that the attempted gifts in remainder were to a class of beneficiaries, so that, upon the deaths which occurred, the survivors still constituted the class; and (2) that the intent of the testator was not to measure the intended gifts from the residue by the amounts designated as the several legacies proposed, but that the will evinces a purpose to confer an interest in the residue which should be dependent upon not

only the amount of the primary legacy but upon the assumption by the intended beneficiary of the character of an actual legatee as to such amount upon the death of the testator.

The argument last stated would impress upon the will the same meaning as if the testator had said: "Having attempted legacies to five persons of certain sums of money, which legacies will fail if they die before me, I direct that each of them shall have such interest in the residue of my estate as shall be measurable by the amount which shall actually come to him. It is for them as legatees, and not as persons who may never fulfill that capacity, that my gift in remainder is intended." Definitions of gifts to a class seem to exclude these gifts, and the controversy narrows to the two remaining claims of construction.

The rule under which, upon the precedence of a person for whom a will has designed an aliquot share, the share falls into intestacy is highly artificial. While criticism of its basis, since it is well established, is not permissible, its foundations may, without disloyalty, be examined when it is sought to extend its application to a will which may substantially vary from the language found in the cases in which the rule has been announced.

It has been applied where the attempted gift was to several persons of distinct fractional shares. *Matter of Kimberly*, 150 N. Y. 90; *Matter of Riches*, 37 Misc. Rep. 464; *Langley v. Westchester Trust Co.*, 39 id. 735; S. C., 180 N. Y. 326; *Betts v. Betts*, 4 Abb. N. C. 317.

In the case of *Kimberly*, cited *supra*, the sole question considered was whether three legatees took as a class, jointly or in common; and it was held that the three "took as tenants in common, and hence that, as to one-third of the testator's estate, he died intestate," though beyond peradventure one of the legatees died before the death of the testator and never took anything, in common or otherwise.

By the cases cited, the proposition is fastened in the law that a person who is simply designated in a will as an intended legatee and who never becomes a legatee may take an estate. But while the mind is thus forbidden to question how in any case the statute directing that "every estate devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy," can possibly be applicable to a person who took no devise, there is nothing in those cases to restrain inquiry whether a will materially different from the wills there construed comes within the grasp of those authorities.

How can a will effect a devise before the testator is dead? What tenancy, whether in common or in any other quality, is vested in a person just because he is named as a devisee or legatee in a will which may be revoked and which, even if confirmed, has no power to devolve any estate until the death of the testator? Why should those incidents of a tenancy in common, which forbid survivorship among those who actually take, be extended to persons who merely take a chance to become tenants in common under an attempted devise which becomes effectual as to one but void as to the other? These are questions which are set at rest by the cases cited, with respect to the language of the wills there construed, and such form of words in other wills as may be found to be substantially similar; but the inquiry survives, whether in the will at bar the provisions are practically within the constraint of the cases cited.

The rule under examination has always resulted in the diversion of a portion of the testator's estate to persons whom he has refrained from mentioning in his will as recipients thereof; and, in every case falling within its influence, the particular facts have led to a disregard of the canon of construction that intestacy is to be avoided, and that a testator is presumed to have intended a comprehensive disposition of all of his estate.

If the gifts in the will at bar are properly capable of the con-

struction that they were dependent upon a crisis or method of determination which could only be developed and appreciated after the testator's death, it is certain that any portion of the estate which might have otherwise passed by one of the contingent gifts must, upon its failure, remain in the residue and be the subject of the residuary disposition. It would be as if the testator had said: "At my mother's death, I desire that my executors shall ascertain who are then my primary legatees in actual enjoyment of their primary legacies and shall pay a share of the remainder to such as then maintain that attitude. As to such as do not then occupy that relation in fact, my proposed gift shall be as if it had never been attempted."

Under the words last imagined, or any of like import, there would not be intestacy. Where, upon the predecease of a proposed legatee, it has been held that the gift to him was distributive and upon its failure fell into intestacy, the several legacies were bestowed *nominatim*, and the will contained no phrase which would affix to the gifts a condition to be fulfilled upon the testator's death.

In the will under examination the testator did not attempt to dispose of the remainder to his beneficiaries *nominatim*. To have named them would have been simple, direct and usual. Gifts by name are sufficiently normal and familiar to justify the conclusion that a testator who has rejected the use of names to describe the objects of his gift has rejected the purpose which would ordinarily adhere to a gift in that form.

No case has been cited of a death among legatees before the testator's death in which persons indicated as beneficiaries have been held to take in common, or in which the will has been construed to contain an intention that such persons shall become tenants in common, unless the gift was by name or by a description which in its value at the time of the making of the will was equivalent to nomination. Gifts *nominatim* imply the purpose that the persons named shall take unquestionably upon the testa-

tor's death. To attach to the gift a description to which the proposed beneficiary must conform necessarily provokes the dilemma of construction, either that the testator conceived of the beneficiary as already clothed with the description and adopted it as an equivalent for a name, or that he looked forward to a time, after his death, when the legatee should assume and answer to the description as a condition of receiving the proposed benefit.

If the qualification adopted by the testator as to the incidental gift was used to the exclusion of the names by which he might readily have indicated his beneficiaries, the resort to the qualification and the rejection of the ordinary method of nomination force the question, did he mean thereby to avoid the result which nomination would have imposed upon his purpose? Any deviation from normal and accessible means, familiarly known to be appropriate to a definite end, may well indicate that the end was not sought and that avoidance of the method premeditated an avoidance of the result to which it was adapted.

The distinction between words importing a gift by name and words of gift to one by description may be without substance when it concerns a primary and isolated legacy, for it makes no difference, either in the testamentary notion or in the administration of the estate, whether a single naked gift of money be made to one by name or description; but the distinction may be dominant and may well lead to diverse results when a testator, having nominated a person for a legacy of money, superimposes a new proposed benefit to be meted out to the legatee in proportion to his original legacy. Any language used in framing this secondary purpose may well demand an interpretation.

This testator's dispositions in remainder were not only not defined by the use of the names of his proposed donees, but they were hedged about with language significantly adapted to a purpose that his beneficiaries in remainder should be only those who should survive him and should present themselves in the capacity

of legatees. His words were: "To the legatees named in Articles I, II and IV herein, respectively, upon the basis of their respective legacies herein." To these were added the two legatees named in the codicil, who were called "pro rata residuary legatees" and "additional residuary legatees" (meaning, of course, additional legatees in remainder).

Thus, there were five persons who primarily were indicated as legatees in specific sums. The proportion in which the remainder was to be disposed of was to conform to their so-called "legacies." In determining whether these words comprehended the persons who were indicated by the will as the recipients of his gift in remainder, or such of them only as upon his death would fulfill that capacity, the words "legatee" and "legacy" must be given their normal influence. They have no meaning in grammatical limits or in legal application except that a legatee is one who gets a legacy and a legacy is that which a legatee gets.

Nemo viventis haeres est. With a certainty no less than that involved in the maxim, no one can be the legatee of one who is alive. He may be the proposed or expected legatee, just as one may be the heir apparent or presumptive, but death of the ancestor in one case and of the testator in the other must come to pass before heir or legatee can actively appear in the character to which he has been potentially appointed.

Hence, while it must be conceded that this testator — a layman drawing his own will — may conceivably have used the words "legatee" and "legacy" loosely to describe the persons merely proposed as possible recipients of a legacy, it is at least equally probable that the words were employed with intelligence and precision; and, in any event, where the search is not so much for the subjective intention of the testator as for the intention which his will expresses, it is safe to resolve the doubt in favor of a construction which is open to no reproach except that it gives words their precise significance. If the words in question,

taken with their context, be regarded as susceptible of their normal grammatical meaning, there is clearly room, if not an imperative warrant, for resort to the presumption against intestacy and for the construction which such presumption suggests.

In determining whether or not the will contemplated that the process of proportion should be applied to the "legatees" and "legacies" as they stood at the testator's death, recourse may be had to article VII of the will. There, in one important respect, appears the distinct purpose that, with regard to those "legatees" and those "legacies," certain process of proportion was ordained which could not be applied to the legatees or their legacies as they might be at the time the will was made, but which was necessarily to be applied only after his death and to the beneficiaries who should then survive. In this article it is provided that, in case the estate shall not realize the sum of \$200,000 for the trust in behalf of the mother, the legacies of the five beneficiaries shall be so scaled and diminished, upon a pro rata basis, as to make the legacy to the mother equal to \$200,000.

It needs no argument to show that the scaling or proportionate diminution here provided for could only be meant to take place among those of the beneficiaries who might be alive when the pro rata diminution should become a practical necessity, and then to the total elimination of the so-called legacies for which no living legatee should appear.

Without undue jealousy for the rule which requires a construction that will avoid intestacy, and, indeed, without reliance on that rule, it may be confidently believed that, where two dispositions by proportion to the same legacies are provided for, the proportioning in each instance is intended to apply to the same persons at the same time and with the same procedure.

Gifts to persons not by name or class, but by character, have always been recognized; and to their efficacy it is essential that the capacity upon which the proposed gift is made dependent

shall be attained by the beneficiary at the testator's death. Of these are legacies to "servants," which do not inure to the good of those who serve the testator when the will is drawn, but to those who appear in that character when he dies; gifts "to my pastor," "to my physician," "to my wife," "to my executors," "to my heirs" or "the heirs of a person other than the testator." These are generally held to apply to those whom the event of the testator's death shall present in the capacity upon which the gift has been made contingent; and, upon the failure of the gift, the sum or portion which was its intended subject lapses, or, strictly, remains in the estate and is not governed by the laws relative to intestacy.

In careful thought no proposed gift of the remainder attempted in this will can be said to lapse into the estate upon the predecease of the intended beneficiary. In such case the portion of the estate which might have passed by the attempted gift has never been detached from the estate and, therefore, cannot fall into it. The gifts fail, and become as if they had never been attempted, because the event upon which the efficiency of the attempt was wagered has not occurred. The words, "I give \$1,000 to A, \$2,000 to B and \$3,000 to C" make no gifts, and can make none, unless the will becomes operative both as to the estate and the proposed donees. Hence, they are said to lapse. When to these words are added, "I give to these legatees the residue in proportion to their legacies," the second devise is subordinate to and dependent upon the vesting of the primary legacies.

So, in the will under examination, the gifts in remainder, which were dependent upon the primary legacies of money, never took effect; and the subject thereof, which had never departed from the residue, remained in it when the principal gift failed and the subordinate gift in remainder, which adhered to the principal gift, failed with it. Had the gifts in remainder been measured by words which clearly imported an intention that the sums of the primary legacies as they stood in the will

and not the sums which should be reduced to enjoyment should be the standard of the proportion, it might be said that the amounts by which the testator's contingent bounty was to be ascertained were not the sums to which the "legatees" as such would become entitled at the testator's death. If such had been the language of the will, it would have afforded encouragement to an interpretation from which intestacy would result upon the pre-decease of one of the beneficiaries. In that case, unless the gift could be said to be still contingent upon the assumption by the beneficiaries of the capacity of legatees, there could be no escape from intestacy. But it is seen that the testator did not attempt to so measure his gifts in remainder.

Where he neither nominates the legatee nor metes out to him his proposed share upon the arbitrary basis of the amount stated in his primary legacy, he gives evidence of an intention which avoids intestacy; for he has rejected two forms of expression, either of which might alone have left a part of the estate undisposed of and both of which together would certainly compel that result.

Upon the question reargued the will and codicil are painfully uncertain. Suppose that the rhetoric of these two papers lends itself equally to the two inconsistent interpretations sought to be imposed upon them, and that there is verbally nothing to choose between a reading which would find in them attempted gifts to five persons in defined fractional shares and the alternate reading which would make these gifts dependent upon the assumption by the proposed beneficiaries of the character of legatees entitled in fact to a primary legacy. Then, if words are at a deadlock and interpretation hangs in balance, there is controlling weight in the principle that the construction must be preferred which would avoid intestacy.

This rule is based upon the conviction that the testator, in the act of making a will, does not intend to leave a portion of his estate undisposed of, unless express words be adopted to indicate that purpose. This testator thought that he was making a

will. He intended, for he is presumed to have intended, that it should embrace his whole estate. Infused with this purpose, any words used by him must be accorded a meaning which tends against intestacy, if capable of such meaning.

Without resort to the presumption against intestacy, but more confidently by its help, the instruments in dispute are best reconciled to the interpretation that the testator's gifts in remainder were meant to inure to the benefit of those only who might maintain the quality of pecuniary legatee in fact at his death; that, as to the two codicillary legatees, the testamentary purpose was that their interest in remainder should be adherent to and contingent upon their actual acquisition of the character of legatees; that their secondary gifts were intended to fail with their primary gifts and that the disposition in remainder to the three surviving beneficiaries embraces the entire residue.

The view in this respect suggested in the former opinion has been confirmed and should be embodied in the decree of probate.

Decreed accordingly.

Matter of Proving the Last Will and Testament of FLORA SEYMOUR, Deceased.

(Surrogate's Court, Rockland County, April, 1910.)

CHARITIES—REQUISITES AND VALIDITY IN GENERAL: CERTAINTY AS TO BENEFICIARY: CERTAINTY OF PURPOSE.

TRUSTS—IMPLIED TRUSTS—IN GENERAL.

Where no reason appears why a testatrix should have intended to give her estate absolutely to the person named in her will as the sole legatee, whom she had known but a short time, the gift thereof to him "to use as he may desire in the Master's work" will not be taken as intending an absolute gift but as an attempt to create a trust which is ineffectual because the objects and purposes of the testatrix are so undefined and the beneficiaries are so indefinite and uncertain that the court could not direct the manner in which her intention should be carried out.

Proceeding for probate of will.

Harris & Maxfield (Philip Van Alstyne, of counsel), for proponent; Forsyth Brothers, for contestants.

McCAULEY, S.—The will offered for probate in this proceeding, which relates only to personal property, was most inartificially and unskillfully drawn and is, in my opinion, invalid by reason of indefiniteness and uncertainty. It contains no attestation clause, but was executed December 9, 1908, in the presence of two attesting witnesses, whose signatures are written to the left and opposite the signature of the testatrix and under the word "witnesses."

The testatrix resided at Hilburn, in this county, where, since September, 1905, she had been employed as a teacher in the public school. She was about fifty years of age and unmarried. During her residence at Hilburn she was actively interested, not only in educational, but in religious work. She became ill of pneumonia early in December and, about two days before she died was removed to a hospital at Suffern. The will was prepared and executed after her admission to the hospital, and but a few hours before her death. It was written for her by a friend who was called in for that purpose and who undertook its preparation without the advice or assistance of legal counsel.

The next of kin of testatrix, who are two surviving brothers, object to the probate of the will and allege, in support of such objection: (1) That the instrument offered for probate is not her last will and testament; (2) that she was not of sound mind and memory at the time of its execution; (3) that the execution of the will was not her free, unconstrained and voluntary act; and (4) that it was not subscribed, published and attested, as required by law. The contestants presented no proof, however, in support of their objections.

The evidence submitted on the part of the proponent estab-

lished to my satisfaction that the testatrix had sufficient mental capacity to make a testamentary disposition of her estate, and that she was not under any restraint at the time of the execution of the will. She expressed to the draftsman her wishes concerning the disposition of her estate, in language that was clear and intelligible, and suggested, when the will was read to her, the insertion of a few words to make the language more explicit and her meaning clearer. She had an adequate comprehension of the condition and nature of her property and of the scope and import of the testamentary provisions. This is the standard which the law requires. *Lavin v. Thomas*, 123 App. Div. 116. That she was very weak, physically, however, her abbreviated signature to the will, written with a tremulous hand and almost illegible, bears unmistakable evidence.

The evidence, also, satisfied me that the statute, prescribing the formalities to be observed in the execution of wills had been substantially complied with. The proof was, therefore, sufficient to warrant its admission to probate. *Matter of Voorhis*, 125 N. Y. 767; *Gilbert v. Knox*, 52 id. 125; *Matter of Cottrell*, 95 id. 329; *Matter of Higgins*, 94 id. 554.

The contestants have, however, expressly put in issue, under section 2024 of the Code of Civil Procedure, the validity, construction and effect of the will; and we are, therefore, called upon to construe its provisions and to determine whether they are legal and effectual. The material portions of the will are in the following words:

"I, Flora Seymour, being of sound mind, hereby direct Mr. R. J. Davidson to turn over to Schuyler C. Pew the four bonds now in his possession and belonging to me.

"It is my desire that if I should be taken away that the said Schuyler C. Pew have this property to use as he may desire in the Master's work."

It is a familiar rule of construction that a testator's intention must govern, if it be not inconsistent with rules of law, statutory

or otherwise. Such intention must, however, be gathered from the language of the will itself; and extrinsic parol evidence as to the circumstances under which the will was executed is incompetent and inadmissible.

The question in expounding a will is not what the testator meant as distinguished from what his words express; but, simply, what is the meaning of his words. When the provisions are ascertained and understood, then is their legality to be determined.

The question then arises: What was the intention of the testatrix as expressed in the language of the will? Counsel for the proponent argue that the language of the will is susceptible of but one interpretation, namely, that the testatrix intended to make, and did make, an absolute gift of the property to Schuyler C. Pew; and that the words "in the Master's work," do not in any sense qualify or limit the gift, but are expressive only of a wish or request that he so use the property.

If the testatrix had intended to make an absolute gift of the property, the language was far more expressive of that intent without the words "in the Master's work" than with them. It should be remembered, in this connection, that these words were written, where they are now found, after the will had been prepared and read to the testatrix, and at her request. There was no reason, so far as the evidence before me discloses, why the testatrix should give her entire estate to Schuyler C. Pew, who was not in anywise related to her and whose acquaintance with her had covered but a brief period of time. He had no claim whatsoever upon her bounty, but he was interested and to some extent actively engaged in religious or evangelistic work.

What, then, was the intention of the testatrix? Did she intend that her estate should be devoted to religious uses and purposes, and to that end was it her intention to create a trust of which Schuyler C. Pew should be the trustee? The provisions of the will are ambiguous, their meaning obscure. In my opin-

ion the provisions must be construed as an ineffectual attempt to create a trust; ineffectual because her objects and purposes are undefined and the beneficiaries indefinite and uncertain.

Mr. Pew was to have the property to use "in the Master's work." These words have no well-defined meaning. We may assume that they refer to religious and charitable work; but it is purely an assumption. There is no beneficiary of the trust, nor does the will specify how or in what manner or for whose benefit he shall use the property.

There can be no valid testamentary trust unless there is a beneficiary either named or capable of being ascertained within the rules of law applicable in such cases. *Read v. Williams*, 125 N. Y. 560; *Fodsick v. Town of Hempstead*, id. 581; *People v. Powers*, 147 id. 104; and *Fairchild v. Edson*, 154 id. 199.

While chapter 701, Laws of 1893, as amended by chapter 291, Laws of 1901, has rendered valid many gifts and bequests to religious, educational, charitable and benevolent uses which, prior to its enactment, would have been invalid by reason of indefiniteness, the bequest under consideration is, nevertheless, in my opinion, invalid under the provisions of that statute.

Chapter 701, Laws of 1893, is as follows:

"Section 1. No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall in other respects be valid under the laws of this state, shall or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the supreme court.

"§ 2. The supreme court shall have control over gifts,

grants, bequests and devises in all cases provided for by section one of this act. * * * The attorney-general shall represent the beneficiaries in all such cases, and it shall be his duty to enforce such trusts by proper proceedings in the court." As amended by chapter 291, Laws of 1901.

The provisions of this statute, as affecting gifts in trust for public charitable purposes, received most careful consideration in *Matter of Shattuck*, 193 N. Y. 446. The residuary clause of the will under consideration in that case was as follows: "All the rest, residue and remainder of my real and personal property, I give, devise and bequeath to my executor hereinafter named, in trust, however, the rents, profits and income thereof to be expended by him annually and to be paid over to religious, educational or eleemosynary institutions as in his judgment shall seem advisable, not more than \$500, however, to be paid to any one such institution in any one year." The reasoning of the court in declaring this clause invalid is so pertinent and applies with so much force to the case before me that I quote the following from the opinion: "The residuary clause of the will of the testatrix would have been void under the law of this state as it existed prior to the enactment of said statute. It is void now unless it is saved by the provisions thereof.

"The selection of the beneficiaries is left wholly to the judgment, from time to time, of the trustee, and the only limitation upon his discretion is that such beneficiaries shall be 'religious, educational or eleemosynary institutions.' In selecting them the trustee is not confined to any creed, denomination or territory. The intention of the testatrix in founding the trust is not expressed. Even if the trustee selected by the testatrix may be presumed to be familiar with her purpose and design and to act upon such knowledge, his death would make it necessary for the court in whom the title to the trust would rest, to direct in regard to its control and disposition.

"It is manifest that it is necessary for a testator to define his purpose and intention in making a trust sufficiently so that the court, at the instance of the attorney-general representing the beneficiaries, can by order direct in carrying out the trust duty.

"Religion is polemic. We have no established religion; and, as there is no guiding hand in the will to direct in the distribution of the testatrix's bounty, the personal views or religious faith of the attorney-general representing the indefinite and uncertain beneficiaries, or of the judge holding the court for the time being and from time to time, might affect the distribution to be made of the income of the trust fund. The distribution from time to time might thus be contradictory in its purposes and results. It would be possible, also, to have the bounty of a testator of uncompromising religious views distributed among institutions managed by those having entirely different and antagonistic views.

"The act of 1893 doubtless saves a trust from being invalid because the beneficiaries are indefinite and uncertain, but a trust may be so indefinite and uncertain in its purposes as distinguished from its beneficiaries as to be impracticable, if not impossible for the courts to administer.

"We make these suggestions for the express purpose of calling attention to the fact that there must be some limitation upon the power of a testator to make a valid trust, if he leaves his objects and purposes undefined and the beneficiaries indefinite and uncertain."

My conclusion is that the provisions of the will are invalid and that probate should be denied, and I so find and decide. A decree may be entered accordingly. The allowance of costs will be determined upon settlement of decree.

Probate denied.

Matter of the Application for an Order to Require the Administrator of the Estate of CARRIE BALDWIN, Deceased, to Pay a Claim for Funeral Expenses, Pursuant to Section 2729 of the Code of Civil Procedure.

(Surrogate's Court, Chemung County, April, 1910.)

EXECUTORS AND ADMINISTRATORS: COLLECTION AND REDUCTION TO POSSESSION OF PROPERTY OR CLAIMS OF ESTATE—PROPERTY CONSTITUTING ASSETS—PROPERTY SET APART TO HUSBAND: ARTICLES SET APART AND SUSTENANCE FOR SURVIVOR AND CHILDREN—ARTICLES SET APART TO HUSBAND.

The exemptions from the estate of a married woman upon her death in favor of her husband provided for by section 2713 of the Code of Civil Procedure are no part of her estate coming to the hands of her administrator applicable to the payment of her funeral expenses.

Petition to compel payment of a claim for funeral expenses.

Edwin C. English (Egbert Shoemaker, of counsel), for petitioner; Charles H. Knipp, for administrator.

MCCANN, S.—Carrie Baldwin, the decedent, was a resident of the city of Elmira, Chemung county, N. Y. Letters of administration were issued to her husband, Benjamin J. Baldwin. Appraisers were appointed and an inventory taken and filed in the surrogate's office November 27, 1909. By said inventory the appraisers have set aside specific articles to the husband under the various subdivisions of section 2713 of the Code of Civil Procedure. Under subdivision 5 of said section there was set aside to the husband \$150 in cash. The general inventory of the estate, after setting aside such exemptions, shows assets of \$66.90. The only asset of the estate aside from the specific articles set aside in the inventory was \$216.90, the proceeds of a policy of insurance, payable to the estate. This proceeding

was instituted by Matie A. Butler, who filed a petition asking for an order to show cause why the administrator should not be required to pay her claim for the funeral expenses of the decedent. The administrator appeared and filed an answer setting up various reasons why said claim should not be paid; but the principal objection offered by the administrator was that there was not sufficient money or other personal property of the estate applicable to the payment of claims to pay the said claim of the petitioner, or any part thereof.

The actual bill for funeral expenses was greater than the amount of the claim presented, but the claim was reduced to an amount which equals the total cash received by the administrator; and the claimant asks that the sum of \$150, which was set aside in the inventory for the husband, together with the sum of \$66.90 which is the total assets of the estate, aside from those set aside as exemptions, should be paid over to her in settlement of her claim. The administrator offered no evidence to question the amount, nor is the validity of the claim in any way questioned.

The petitioner insists that the funeral expenses should be paid first, before setting aside money to the husband as exemptions under section 2713. Numerous authorities are cited by the petitioner, which show that funeral expenses take priority over any and all debts and claims against a decedent, and are a charge upon her estate, etc.; but, inasmuch as that question is not at issue, the disposition of this case rests entirely upon the question as to whether or not funeral expenses have priority over cash exemptions set aside under subdivision 5 of section 2713 and also have such priority that the court can now decree that the amount set forth in the general inventory, to wit, sixty-six dollars and ninety cents, should be paid upon this claim.

The only authority cited by the petitioner is *Matter of Berns*, 52 Misc. Rep. 426, in which the surrogate of Kings county re-

fers to various decisions in this State bearing upon the right to set aside cash in lieu of exemptions and then decides that funeral expenses have priority over any cash which may be set aside by the appraisers. It would appear from the statement of facts in the Berns matter that there were \$25 worth of furniture and \$125 in cash set aside under subdivision 3 of section 2713, and \$150 set aside under subdivision 5 of section 2713. I assume this to be the fact from the general statement of facts set forth in the first paragraph of the opinion; but, without discussing the question as to whether cash can be set aside in lieu of specific articles under subdivision 3 of the section quoted, there can be no question that cash may be set aside to the extent of \$150 under subdivision 5 of section 2713, and it is with such an exemption that the present case has to deal. The decision in *Matter of Berns* holds that the exemptions set aside to the widow were properly set aside under the Code of Civil Procedure, but that such property is first subject to the payment of funeral expenses. I cannot agree with the learned surrogate in the conclusion which he has arrived at in this decision. I believe that the amendment to section 2729 of the Code of Civil Procedure was intended only to provide a summary remedy for the payment of funeral expenses and was not intended to change the rights of claimants for such expenses. The Berns decision proceeds upon the theory that the amendment to the Code providing this summary remedy having been made subsequently to the decision of the court in the *Matter of Williams*, and such amendment having included within it the specific use of the word "money," make it evident that it was the intent of the Legislature to allow the bill to be paid if it Without entering into a discussion as to whether or not the personal representatives of the deceased sufficient to meet it. Without entering into a discussion as to whether or not the *Matter of Williams* decided, as the learned surrogate has concluded, I do not believe that the Legislature intended that such

amendment should in any way have any effect upon the provisions of section 2713. It is said in *Matter of Berns*: "If the claim be reasonable and properly and fairly incurred, the only condition precedent to recovery is the establishment of the fact that the personal representative of the deceased has received moneys belonging to the estate."

As a first answer to that proposition, I would claim that the representative of the deceased has not "received moneys belonging to the estate." The money set aside under subdivision 5 of section 2713 did not belong to the estate. *Crawford v. Nassoy*, 173 N. Y. 166.

A long line of cases in this State holds that such moneys are not moneys of the estate, and the language of section 2713 holds that such moneys are not to be treated as assets of the estate. I believe it is the duty of the personal representative of the deceased to pay over only such moneys as under section 2729 are "applicable thereto." An analysis of subdivision 3 of section 2729 shows in the first sentence that "every executor or administrator shall pay out of the first moneys received the reasonable funeral expenses of decedent, and the same shall be preferred to all debts and claims against the deceased." The language, "out of the first moneys received," has been construed in the *Berns* case to include moneys set aside as exemptions; but the subsequent language of this same sentence, in stating the preference of claims for funeral expenses, limits such preference only as against "debts and claims against the deceased." It is subsequently stated in this same section that "If upon the return of such citation it shall appear that the executor or administrator has received moneys belonging to the estate which are applicable to the payment of the claims for funeral expenses, the surrogate shall * * * make an order directing the payment * * * of such claim or such proportion thereof as the money in the hands of the executor or administrator applicable thereto may be sufficient to satisfy."

Subsequently, in this same section, it provides for a renewal of the application when it appears that the administrator "has received money belonging to the estate;" and, still later in the section, a reference is made to "moneys in the hands of such executor or administrator applicable to the payment of his claim."

I do not believe that the language of this section can be so construed as to mean that any moneys that may come into the hands of an executor or administrator shall be paid out by him for funeral expenses, but, on the other hand, that it means that only such moneys shall be paid out for such a claim as "are applicable to the payment of such a claim." I have construed such language to mean moneys which the executor or administrator shall have after the setting aside of the proper amounts as exemptions, and also after retaining in his hands a sufficient sum for the payment of the expense of administration, as is provided by the last clause of section 2729.

The only moneys which have been received by the administrator, Baldwin, are the amount which has been set aside under said subdivision 5 of section 2713, and also sixty-six dollars and ninety cents which are certainly no more than would be sufficient to pay the expenses of the administration of the estate. If the decision in the Matter of Berns is to be held as law, then a new rule of distribution has been established in this State. Formerly the money which an administrator received should be: (1) Applied to the payment of exemptions; (2) expenses of administration; (3) funeral expenses; and (4) other debts. Under the rule which would be established in the Berns case, the order of distribution of assets would be: (1) The payment of expenses of administration under the last clause of section 2729; (2) the payment of funeral expenses under such section; (3) the payment of exemptions under section 2713; and (4) the payment of the debts. I cannot believe that the Legislature intended any such radical change in the law. I appreciate fully the in-

justice in many cases, and perhaps in this case, of allowing the husband \$150 in cash and permitting the funeral expenses to remain unpaid; but I do not believe that it is the province of this court to consider at length the question of injustice, in view of the specific language of the statute as I construe it. It follows, therefore, that the application of the petitioner must be denied, and a decree may be entered accordingly.

Decreed accordingly.

In the Matter of the Settlement of the Estate of PAMELIA REED
SEELEY, Deceased.

(Surrogate's Court, Orleans County, April, 1910.)

EXECUTORS AND ADMINISTRATORS—DEBTS AND LIABILITIES OF THE ESTATE—
EXHIBITION, ESTABLISHMENT, ALLOWANCE AND ENFORCEMENT OF CLAIMS
—SERVICES TO DECEDENT—PAYMENT BY LEGACY.

PAYMENT—MODE AND SUFFICIENCY OF PAYMENT—LEGACY.

Where a niece who has lived with her aunt and has been brought up by her after reaching mature years leaves her and engages in different pursuits; but later when her aunt after absence in another State returns to her former home in feeble health the niece goes to live with her and does the work of the household until the aunt's death, for which the aunt told her she should be well paid, and it appears that the niece expected such compensation to be made by the aunt's will, and the aunt makes provision for the niece in her will to an amount in excess of the fair value of her services, the legacy is to be regarded as having been intended as compensation for her services, and a claim in addition thereto should be disallowed.

Proceeding upon the settlement of the accounts of an administrator.

Edwin L. Wage (Warner Thompson, of counsel), for Anna May Storms, claimant; W. Crawford Ramsdale, for Fordyce D. Reed; Gerald B. Fluhrer, for the administrator with the will annexed.

SIGNOR, S.—From the evidence in this case it appears that the claimant was a niece of the decedent and when about four years of age went to live with her and was brought up by her, a relation somewhat similar to that of parent and child existing between the two. After the claimant had arrived at mature years, she ceased to live with the decedent, but was a nurse and engaged in other avocations; however, calling it her home at the decedent's house. It appears that sometime in the spring of 1906, and about April first, the decedent returned from the State of Michigan, where she had been living, and began house-keeping in the village of Holley. The claimant, Mrs. Storms, went to live with her. The decedent was in feeble health and, according to the testimony of Mrs. Hayford and others, the claimant performed all or nearly all of the work in the house, including cooking, laundry work and whatever was to be done about the place, and she remained there performing such services as were necessary until the death of the decedent with the exception of a few days when she was engaged in working in the canning factory.

I think, from all the evidence in the case, that there was an expectation upon the part of both the decedent and the claimant that she was to receive compensation for the services which she rendered. There is no proof of any contract. In fact the circumstances rather indicate that there was no agreement between the parties as to the compensation to be paid or whether any compensation was to be paid; but, from the evidence of Mrs. Hayford, it appears that the decedent told her that she wanted the claimant to stay with her and that while she had never made any bargain she would be well paid for her services.

There is evidence that the claimant stated to Mr. Herbert T. Reed, and also to Mr. Fordyce Reed, that she had intended to make no claim for her services, and that if she had been provided for in the will as she expected to have been, she would have presented none.

I think this case differs from one where services by a member of a family are rendered for other members of the family, and where there may be a presumption that no reward for the services was intended. In this case the claimant had lived away from the decedent's home for some time; and I think the facts and circumstances would bear out the statement that she had returned and was remaining at the home of the decedent for the purpose of caring for her and that both the decedent and claimant expected that in some way she would be paid for her services. See *Matter of Galway*, 19 Misc. Rep. 92.

The question, moreover, arises whether she has been paid for her services by the provision made in the will. I think it is evident from her own statement that all she expected was that there would be a provision in the will amply to compensate her for what she had done, and if this was made she did not intend to present a claim. The evidence is that her services were worth the sum of \$382.50. On the other hand, it appears that she is a legatee under the provisions of the will to the extent of \$1,000. In my judgment, if the provision of the will had been less than the value of her services, she could have presented a legitimate claim against the estate for such a sum in excess of that as would have compensated her for what she had done for the decedent. I am, however, of the opinion that, having been made a legatee under the will to an extent considerably in excess of the value of her services, there can be no further recovery in this matter. As I have said, it seems plain to me that what she expected was that she would be provided for in the will to an extent which would compensate her for what she had done; and, as it is very evident that this provision was made, I cannot see how the court can, under the circumstances, allow anything in excess.

The claim, therefore, must be rejected and a decree to that effect may be entered.

Decreed accordingly.

Matter of the Appraisal Under the Acts in Relation to Taxable Transfers of Property of the Estate of JANETTE W. BAKER, Deceased.

(Surrogate's Court, Kings County, April, 1910.)

TAXES—INHERITANCE AND TRANSFER TAXES—PROPERTY AND INTEREST SUBJECT TO TAX—PROCEEDS OF LANDS IN FOREIGN STATE UNDER CONTRACT OF SALE.

Where at the time of a decedent's death she had contracted to sell lands owned by her in another State and had signed and sealed a deed thereof which was afterward delivered, the proceeds of the sale received by her representatives after her death are not taxable under the law relating to taxable transfers.

Appeal from an order of an appraiser, fixing and assessing the transfer tax.

Henry B. Corey, for residuary legatees, appellants; William W. Wingate, for State Comptroller, respondent.

KETCHAM, S.—The question is presented by the appeal of the residuary legatees: Where at the time of the decedent's death she was under contract to sell lands in another State, and left a conveyance thereof which was delivered on the day after her death, in consideration of the price named in the contract, is the transfer tax to be imposed upon the cash which was received after death as the price of the lands?

The land was not taxable, and the order by which its proceeds had been taxed can only be justified on the theory that the testatrix had possession of these proceeds. She could not have been both seized of the land and possessed of the money, and as she had not parted with the legal title to the real estate no one will claim that she was legally possessed of the cash. Hence, the taxing officer is reduced to the contention that for the present

purpose the decedent was equitably the owner of the moneys, because under her contract she would have become such owner if she had lived and performed the contract.

The claim leads one to wonder what would have been the attitude of the transaction if the decedent at her death had been possessed of a sum of money which was then about to be paid for Nebraska lands under her contract for their purchase. In the case supposed, there would be as much conversion of money into land as in the case at bar there is a conversion of lands into money, and, if the tax imposed can be sustained, it must be upon reasoning which would inevitably lead to an escape from the tax whenever the decedent dies while under contract to purchase nontaxable property.

The doctrine of equitable conversion, in its application to a decedent's estate, concerns only those who have come into relations of contract or privity with the decedent or his estate. The fiction of conversion adjusts rights and imposes equities, but it cannot change facts or work inequity. In adopting it, the law makes belief that the things which have been arranged to be done have been done, but this amiable pretense must be confined by the impulses which inspire it to the persons in privity with the transaction. There is no equitable need for its extension to others. Strangers have nothing to do with the reason for its being and nothing to do with its operation. In the best defined case of equitable conversion, the legal owner of the lands retains as to persons not in equitable relations to himself all the rights and duties which belong to his seizin.

Though his land be equitably converted into money, he will still be prosecuted for its unlawful use and made liable for injuries resulting from its negligent or unlawful condition, and strange would be the defense that he no longer owned the land because it had been equitably converted.

The term itself, by which the conversion is expressed, confesses that the persons whose lands are converted remains the

legal owners. "He is deemed in equity to stand seized of the land for the benefit of the purchaser." *Williams v. Haddock*, 145 N. Y. 144. His legal estate descends to his heirs, although they in turn take their estate burdened with the equity under which they may be compelled to convey. It is not only impossible that a legal estate can be extinguished by the law's imagination, but it is essential to the operation of the doctrine itself that the legal title remain in the original owner.

In *Matter of Swift*, 137 N. Y. 77, this question was determined. The observations in that case are none the less controlling because the conversion there resulted from the directions of the testator's will. The teaching of the case doubtless is that, however the equitable conversion may have been effected, by will or contract, the property is to be taxed or exempted according to its nature and tenure at the decedent's death. It is there said: "The question of the jurisdiction of the State to tax is one of fact and cannot turn upon theories or fictions which, as has been observed, have no place in a well-adjusted system of taxation. * * * If the property in the foreign jurisdiction was in land, or in goods and chattels, when, upon the testator's death, a new title, or ownership, attached to it, the bringing into this State of its cash proceeds, subsequently, no matter by what authority of will, or of statute, did not subject it to the tax."

To the same effect is *Matter of Sutton*, 3 App. Div. 208; *aff'd*, 149 N. Y. 618.

The rule that the transfer tax should be imposed upon property in the form in which it stands at the testator's death has been applied to the advantage of the taxing power where the equitable conversion changed a portion of the estate from taxable to nontaxable property. *Matter of Offerman*, 25 App. Div. 94; *Matter of Bartow*, 30 Misc. Rep. 27.

The order appealed from should be so modified that no tax shall be fixed upon the sum of \$26,400, reported by the appraiser as additional personal property.

Decreed accordingly.

Matter of the Judicial Settlement of the Accounts of DANIEL BENNINGTON and BANCROFT F. BISHOP, as Administrators of the Estate of ROBERT H. BENNINGTON, Late of New Lisbon, Deceased.

(Surrogate's Court, Otsego County, April, 1910.)

EXECUTORS AND ADMINISTRATORS—DISTRIBUTION AND DISPOSAL OF PERSONAL ESTATE—COMPUTATION AND ADJUSTMENT OF INTERESTS AND DISCHARGE THEREOF—COMPUTATION AND SHARES OF DISTRIBUTIVE FUNDS—ADVANCEMENTS—WHAT CONSTITUTES.

WILLS—INTERPRETATION AND CONSTRUCTION—ADEMPTION, REVOCATION AND SATISFACTION—SURRENDERING EVIDENCE OF LEGATEE'S DEBT AS SATISFACTION.

Where the son of a testator had of his father money for which interest bearing promissory notes were given upon which the son paid interest from time to time for several years down to the time when the notes were surrendered to him by his father, the transaction must be interpreted as a loan.

And if nothing appears indicating an intention to convert the loan into an advancement, the amount may not be set off against a legacy left to the son by the father in his will.

Even if the original loan was intended to be an advancement, the father's subsequent conduct in delivering to his son the notes he had taken, accompanied by declarations only consistent with his intention to treat the notes as no longer a part of his estate or an indebtedness against his son, would prevent their being treated as an advancement.

Proceedings upon the settlement of the accounts of administrators.

Merritt Bridges, for administrators; Arthur W. Morse, for Elva M. Bennington, as administratrix of the estate of Samuel J. Bennington, deceased; L. E. Walrath, special guardian for Matilda Bennington, an incompetent person.

WILLIS, S.—On the final judicial settlement of the estate of the above-named decedent it was claimed on the part of the ad-

ministrators that there should be deducted from the share of Samuel J. Bennington, passing to his administratrix, the sum of \$2,381.97, claimed to have been advanced by the intestate to his said son, Samuel.

The evidence shows that Samuel had of his father \$1,850, for which his father took from him two interest-bearing promissory notes; that Samuel had paid the interest on these notes from time to time for several years, down to the time when the notes were surrendered to him by his father.

I do not think this evidence is capable of any other construction than that this \$1,850 was in the nature of a loan. The fact that the intestate took interest-bearing notes payable to himself, received interest upon the same from time to time, and probably some of the principal, is only consistent with the theory that it was the intention of both parties to treat the transaction as a loan. *Bruce v. Griscom*, 9 Hun, 280; *aff'd*, 70 N. Y. 612.

Assuming, then, that the transaction was originally a loan, is there anything in the evidence showing an intention on the part of the parent to change the indebtedness to an advancement, with the intention that the amount should be deducted from the share of Samuel in the parent's estate under the rules of law applicable to advancements? I think not.

If the father intended that the share of Samuel in his estate should be charged with the amount remaining unpaid, if any, on these notes, he had only to hold the notes so that they would pass to his personal representatives and such result would have necessarily followed. The amount of the notes would have been a legal setoff against the share of Samuel in his father's estate. But the father did not hold and retain the notes. He took them to Samuel, delivered them to him accompanied by declarations only consistent with his intention to treat the notes as no longer a part of his estate or an indebtedness against his son Samuel.

I think the evidence as to what took place at the time these notes were delivered to Samuel shows beyond question that it

was the intention of the intestate at that time to settle and cancel any indebtedness or obligation which he then held against his son Samuel, evidenced by those two promissory notes, and that the transaction amounted to an absolute gift, not only of the notes but of the indebtedness secured thereby.

Assuming, however, for the sake of the argument, that the original transaction at the time of the making of the notes was an advancement instead of a loan, the acts and declarations of the intestate at the time of the surrender of the notes would clearly indicate an intention on the part of the parent to settle and cancel any obligation on the part of Samuel to repay the amount of such advancement to the estate of the parent or to have the same deducted from the share of Samuel in the estate of the parent. *Webster v. Gray*, 54 Hun, 113; *Matter of Burd-sall*, 64 App. Div. 346.

Terms of the decree herein will be settled at a term of the Surrogate's Court of Otsego county, N. Y., to be held at County Court chambers in the city of Oneonta, Otsego county, N. Y., on the 14th day of April, 1910.

Decreed accordingly.

**Matter of the Probate of the Last Will and Testament of FRED-
ERICK W. MILLER, Deceased.**

(Surrogate's Court, Kings County, May, 1910.)

**DEATH—ABSENCE AS RAISING PRESUMPTION OF DEATH—DISAPPEARANCE IN
FACE OF FATAL DANGER.**

EVIDENCE—PRESUMPTIONS—BIRTH, DEATH AND SURVIVORSHIP.

Though the unexplained disappearance of a man is not of itself sufficient foundation for the presumption of his death, yet from his disappearance in the face of a fatal danger his death may be inferred.

Proceeding upon the probate of a will.

James C. Cropsey, for proponent; Foley & Powell (Henry A. Powell, of counsel), for contestants; William S. Butler, special guardian.

KETCHAM, S.—The issue is whether or not the testator died, on or about the 30th day of April, 1908.

At that time he owned a houseboat, kept at Rockaway Park, in Jamaica bay, moored off the pier of a boatman who was engaged in hiring and keeping boats.

The testator for a few weeks prior to the day mentioned was in the habit "pretty nearly every day" of going from Brooklyn to Rockaway Park and sleeping aboard his boat.

On the morning of the thirtieth of April he was working on his boat and then, according to his wont, left aboard of her a dog, of which he was fond.

A scow belonging to the boatman lay inshore from the testator's boat. Access to the scow could ordinarily be had by planks reaching from the shore to the scow.

The night of April 30th was stormy, with unusually high tide, high wind and heavy rain. The tide had turned about eight o'clock and was running out, and the wind was offshore and coincided with the ebb tide.

The distance from the scow to the houseboat was about eighty feet, and the depth of water at the houseboat was about four feet.

On the following morning it was found that the planks usually in position between the shore and the scow had been under water and that other planks had been placed so that a person could have walked right from them onto the scow.

The testator reached Rockaway Park on the evening in question by train, arriving at about nine o'clock. The station was about 400 feet from the scow above referred to.

The testator was last seen proceeding in the direction of the scow. He had rubber boots and at ordinary tide walked right

out to his boat. There is evidence that the testator intended to go to his boat, for when a friend said to him, "It is raining pretty hard; you had better be careful when you go to the house-boat," he put up his hand and said, "That is all right," and walked away.

There is evidence that he made the attempt to reach his boat, for a pair of trousers, well proven to have been his, were found the next morning hanging upon a nail in a closet on the boatman's scow. In these trousers were found about twenty-two dollars in money and a bunch of keys belonging to the testator.

It is stated that he was intoxicated on the evening in question, but to what degree does not appear. No evidence is given of his existence after that night. The testator left a considerable estate, both real and personal.

These facts justify belief that the testator endeavored to put off from the scow to his boat and was drowned in the effort, and that his body was carried to sea.

It must be remarked that among the keys found the next morning, as described, was one which opened the testator's house-boat, and that without its use he could not have obtained access to its interior; but so far as this fact is inconsistent with the theory above expressed, it is overcome by the many other suggestions of the evidence and may be ascribed to testator's condition and forgetfulness.

The rules applicable to unexplained disappearances have no relation to a disappearance in the face of a fatal danger. Where one has vanished from the view of his associates without any intimation of the reason or manner of his departure, it is held that there is no presumption of death sufficient alone to constrain a finding. *Matter of Board of Education of New York*, 173 N. Y. 321; *Dunn v. Travis*, 56 App. Div. 317.

But the reasoning of these cases would have little influence where a person, when last seen, was going into battle or falling from a ship in a storm.

The circumstances surrounding the testator when last seen were such as to justify the conclusion that he died from the normal and usual development of circumstances then in process and there can be no more need or room for further inquiry than there is in the case of ordinary death in the sight of numerous witnesses.

The will is admitted to probate.

Probate decreed.

Matter of the Appraisal, Under the Transfer Tax Acts, of the Property of MARIA E. GREEN, Deceased.

(Surrogate's Court, Kings County, May, 1910.)

TAXES—INHERITANCE AND TRANSFER TAXES—PROPERTY AND INTEREST SUBJECT TO TAX—WHAT CONSTITUTES TAXABLE TRANSFER.

When a wife, resident in the State, dies without a will, leaving her husband and no descendants, the husband does not take her personal estate by virtue of the intestate laws of the State, and there is no taxable transfer thereof.

Affirmed 144 App. Div. 232.

Appeal from an order assessing and fixing the transfer tax.

William Murray, for appellant; William W. Wingate, for State comptroller, respondent.

KETCHAM, S.—Upon an appeal from the adjustment of the transfer tax the question is presented: When a wife, resident of the State, dies without a will, leaving her husband and no descendants, is there a taxable transfer to the husband of the personal property of which she died possessed?

To uphold the tax it must be found that the husband has taken the property "by the intestate laws of this State." Tax Law, § 220, subd. 1.

It is naught for the present purpose that the husband's as-

sumption of complete enjoyment of the property coincided with the death of the wife or happened because of it.

The statute has refrained from any language which would impose a tax upon rights of property which ripen or come to pass as an incident or result of death.

In *Matter of Starbuck*, 137 App. Div. 866, the prevailing opinion employs language with respect to the estate of curtesy which clearly applies to the husband's right in personal property under the circumstances here involved.

Among other things, Mr. Justice Thomas there says: "Its origin and continuance are due to the law, but not the law that appoints the inheritable property of an intestate to prescribed heirs. It is unimportant in the present inquiry upon what theory, adopted at remote time and now obscure in motive, the law proceeded in making this transfer to the husband. It is only necessary to establish that it was not and is not an intestate law."

In the case supposed at the head of this opinion, the husband takes his right in personal property by virtue of his marriage; he enters upon its enjoyment by virtue of the death of his wife. His right, as well as the absolute ownership into which it matures, springs from the common law, and neither can be said to come to him by the intestate laws.

"The words 'intestate laws' refer to the statutes governing the descent and distribution of a decedent's property." *Matter of Starbuck*, *supra*.

No warrant for such right, or any of its fruits or incidents, can be found in the Statute of Distributions.

The order which fixed the tax as upon a taxable transfer should be reversed.

Order reversed.

In the Matter of the Application for the Removal of MARIA P. STERLING and HANNAH E. BROWN, as Executrices and Trustees Under the Last Will and Testament of HARRIET CRAMSEY, Deceased.

(Surrogate's Court, New York County, May, 1910.)

EXECUTORS AND ADMINISTRATORS—APPOINTMENT AND QUALIFICATIONS OF PERSONAL REPRESENTATIVES, RESIGNATIONS AND REMOVALS—REMOVAL OR SUBSTITUTION AND REVOCATION OR MODIFICATION OF LETTERS—GROUNDS—MISCONDUCT, NEGLIGENCE OR NON-PERFORMANCE OF DUTY.

Where the executrices of their mother's will, through the agency of the son of one of them, acquired the right of the son of a deceased brother in property of the estate by fraud, for a grossly inadequate price, recognizing him in the transaction as a legitimate child, they cannot afterward justify their conduct by alleging their belief in his illegitimacy, but should, on his petition, be removed from their office.

Proceeding for the removal of executrices and testamentary trustees.

Geo. W. Bristol, for petitioner; Creevey & Rogers, for Maria P. Sterling; Bergen & Prendergast, for Hannah E. Brown.

THOMAS, S.—The respondents are executrices of the will of their mother, and the petitioner is the only child of their deceased brother. The adjudication of the Appellate Division of the Supreme Court (111 App. Div. 568), affirmed by the Court of Appeals, establishes that the petitioner's mother was the wife of the deceased brother of the respondents, that he is the heir at law and next of kin of the deceased brother, and that a deed of conveyance and an assignment of his interest in the estate of the decedent, executed by the petitioner to one Charles Archer Sterling, the son of one of the respondents and the nephew of the other, in 1902, for the total consideration of \$500, were procured fraudulently from him and were, there-

fore, void. The value of the property thus attempted to be transferred was about \$5,000 or \$6,000. It now appears that in this transaction Charles Archer Sterling acted, actually though secretly, for the respondents; that the \$500 paid by him to the petitioner as a consideration for the execution of the deed and assignment, and the \$300 paid to two persons who assisted in the fraud, were furnished by them; that they remained back of the transaction, directing the defense to the action brought by the petitioner to set aside these papers fraudulently obtained from him, and paying the expenses thereof, the litigation lasting until the judgment upon the remittitur of the Court of Appeals, rendered in June, 1907; and thereafter, in July, 1907, by a writing bound themselves to indemnify George Archer Sterling for all disbursements made or to be made by him in their behalf. Shortly after the date of the fraudulently procured papers of 1902 Mr. Charles Archer Sterling executed instruments, transferring to each of the respondents an undivided one-half of the property thus obtained, which were never recorded, and subsequent events rendering them of no value they were destroyed. In the procuring of the deed and assignment some part of the money used by the respondents was money of the petitioner in the hands of the respondents as trustees, and some of the money used in the expenses of the litigation was also trust funds in which the petitioner had an interest.

The present application is to remove the respondents as trustees. The facts recited are, in my opinion, abundantly proved. It is contended for the respondents, that they believed upon reasonable grounds that the petitioner was illegitimate, and that for all they did this belief furnishes a sufficient justification. I agree that a strong belief of that kind may explain why the improper acts of the respondents were performed, but it cannot make those acts right or honest. It must be remembered that the transaction did not take the form of the extinguishment of a

claim to rights as an heir, made by the petitioner and denied by the respondents. If that had been the case the petitioner would have been put upon inquiry to determine the question for himself as to whether the weakness of his proof of his mother's marriage and of his own legitimacy did or did not require him to accept less than one-tenth of the value of his interest in the estate for a release of the whole. The respondents, on the contrary, having knowledge of the petitioner's existence, searched him out, informed him that he had rights, but tricked and deceived him as to their value; prepared documents for his signature in which the fact that he was the legitimate child of his father was recited; demanded and received from him an affidavit of his birth and identity; taught him how to sign his real family name to these documents, and then paid him an utterly inadequate consideration therefor, such consideration being in part, at least, made up of trust funds in their hands in which he had an interest. Their agents led him to think that they believed him legitimate. I am of opinion that they did believe him legitimate, and the evidence in this proceeding is in accord with the solemn judgment of the Court of Appeals that he is legitimate. To deal with him as legitimate, secretly planning to justify their evil treatment of him by asserting his illegitimacy, was not honest. The respondents were trustees and owed trust duties to the petitioner. The petitioner was also a tenant in common with them in the real property in this city. He was a party interested in "the estate," and no transaction was possible "for the benefit of the estate" which could not benefit him. To say that the respondents could acquire his rights "in the estate" at a sum absurdly under their value, for the benefit of themselves and other parties in interest, and that such a transaction could properly be said to be for the "benefit of the estate" is nonsense. And when it is shown that such a transaction was made, and that it lacked the elements of ordinary fairness essential to the validity of a sale

between strangers, and that the respondents were parties to it, I am unable to see how I can impute innocence or lack of intentional wrong to them. As it appears to me it was a fraud, requiring the inference that its perpetrators are dishonest and unfit to act as trustees. The use by the respondents of trust funds in which the petitioner had an interest, that fact being concealed from the petitioner to induce a transfer by him of his share in the trust fund to other persons, was an "improper application of the money and property in their charge," and was "misconduct in the execution of their trust," and leads to the same inference. Code Civ. Pro., § 2817. And when we learn, as we do in this case, that the trustees claimed the benefits of this beautiful scheme for themselves, and fought for it to the end, we merely emphasize the result.

I cannot agree that the respondents are entitled to any consideration, because after all of the litigation had the courts have decided correctly, and the heir has in part come into his own. The restitution was long delayed and does not afford complete indemnity for the expenses of the contest and the assaults upon his mother's memory and his own legitimacy.

The objection that other parties are not joined to the proceeding must be overruled. The statute under which the surrogate acts requires only that the testamentary trustee proceeded against shall be "cited to show cause." Code Civ. Pro., § 2817.

The application is granted, with costs, to be paid by the respondents personally.

Application granted, with costs.

Matter of the Judicial Settlement of the Account of CHARLES H. BOYER and FRANK W. BOYER, as Trustees Under the Last Will and Testament of AMELIA S. SHERMAN, Deceased.

(Surrogate's Court, Kings County, May, 1910.)

TRUSTS—ACCOUNTING AND DISCHARGE—RELIEF GRANTED.

The decree to be entered upon the accounting of a deposed trustee must require the estate to be turned over to his successor in money, in the absence of special convention to the contrary.

In such case the removed trustee is entitled to a clear title to doubtful assets either before or at the time of the decree requiring the payment of the fund in cash.

Proceeding upon the judicial settlement of the account of trustees.

Sparks & Fuller, for trustees; Blandy, Mooney & Shipman, for contestant; Charles C. Protheroe, for Russell W. Boyer, remainderman.

KETCHAM, S.—The decree to be entered upon the accounting of a deposed trustee must sound in money only. It must contain "a summary of the account as settled." Code Civ. Pro., § 2551. Unless by special convention, the direction must be that the fund be turned over to the successor in money and not in kind. No substituted trustee can be asked to take as cash securities which he neither selected nor approved.

If the accounting trustee has investments of the fund which his successor will not accept, he is equitably entitled to the personal ownership of the rejected securities.

While a keen regard for the safety of the trust would suggest that, in some cases, bad securities might be better than nothing and that they might well be held by the substituted trustee until the decree for payment was fulfilled, there seems

to be no warrant for such an arrangement. It is held that the removed trustee is entitled to a clear title to the doubtful assets, either before or at the time of the decree requiring payment from him of the fund in cash.

In this regard, it is said: "He should have them" (all the assets for which he is refused credit) "if for no other reason, in order to fulfill the requirements of the decree" (*Matter of Niles*, 113 N. Y. 547, 554), and again, "As the executor is required to pay cash to the estate he becomes the equitable owner of the bonds and mortgages in which he has invested the proceeds of the estate, and it may very well be that unless he can make use of these bonds and mortgages he will be without funds to comply with the decree and, therefore, being unable to make compliance may be punished for contempt." *Matter of Ryer*, 94 App. Div. 449, 451.

One of the remaindermen asks that the decree, in addition to directing the transfer in cash of the funds, shall require the immediate deposit of the securities in court, under section 2803 of the Code; but the provision cited has no relation to the removal of a testamentary trustee, and, if it were applicable, it should yield to the rule quoted *supra*, since it is within the discretion of the court.

A practical difficulty is that only one of the removed trustees accounts. The other is not within the State, and it is asserted that there would be danger to the accounting trustee if these securities should be made subject to the control of his associate or liable to his debts. All the assets in question, however, are now in the hands of the accountant and a transfer will be made to him alone.

The decree must, therefore, provide for the payment to the successor trustee, to be appointed, of \$57,799.32, and must direct that the substituted trustee execute to him such instrument as may be necessary to transfer to him title to all of the investments presented by the account.

Decreed accordingly.

Matter of the Estate of MATILDA McNALLY, Deceased.

(*Surrogate's Court, Kings County, May, 1910.*)

EXECUTORS AND ADMINISTRATORS—ACCOUNTING AND SETTLEMENT—RIGHT TO REQUIRE ACCOUNTING, TIME FOR ACCOUNT, ETC.—TIME FOR ACCOUNTING—LACHES OR DELAY.

Where distributees of an estate and the deceased administrator were of the same family, in a proceeding for the settlement of the latter's account by his personal representatives the former are not to be held guilty of laches merely because the administrator remained living in office for twenty years after the time when he might have been required to account.

Proceeding upon the account of administrators.

Goldie & Gumm, for administratrix *de bonis non* of Matilda McNally, deceased; Robert O'Byrne, for Ellen T. McNally, executrix of John J. McNally, deceased, administrator of Matilda McNally, deceased.

KETCHAM, S.—The account must be charged with \$904.34, which came into the hands of the administrator of the original estate on November 8, 1888, with interest thereon at the rate of four per cent.

No credits against this sum can be found.

There is no defense to the petitioner's claim for an accounting, either by reason of the Statute of Limitations (Matter of Ashheim, 111 App. Div. 176; 185 N. Y. 609), or the lapse of time. *Treadwell v. Clark*, 190 N. Y. 51, 60.

The deceased administrator remained alive and in office for twenty years after the time when he might have been required to account; but the distributees were of his own family, and there is no ground for a finding that there was on their part any unreasonable delay in asserting their right to an accounting. Indeed, whether the equitable doctrine of laches, distinct

from the Statute of Limitations, exists or not, it is hard to imagine that the distributees of an estate can have waived their remedies by delay for a period during which the law has continued to assure them that no limitation upon their right could begin to run until the administrator had openly repudiated his trust.

The account will be settled accordingly.

Decreed accordingly.

Matter of the Estate of WILLIAM P. PETERSON, Deceased.*

(Surrogate's Court, Cattaraugus County, May, 1910.)

EXECUTORS AND ADMINISTRATORS—ACCOUNTING AND SETTLEMENT—CONTEST, OBJECTIONS AND HEARING AND SETTLEMENT THEREOF—PRESUMPTIONS AND INFERENCES.

SURROGATE'S COURTS—PROCEDURE AND REVIEW—ORDERS AND DECREES—OPENING, VACATING AND CORRECTING—GROUNDS—ERRORS OF LAW OR FACT.

Where, upon the accounting of an administrator, creditors of the decedent appear and prove judgments recovered against him in his lifetime and the next of kin thereupon prove the discharge of the decedent in bankruptcy subsequent to the recovery of the judgments, the judgments are presumed to have been discharged and the burden is on the creditors to show that the debts for which their judgments were recovered were such as are by law excluded from the operation of a discharge in bankruptcy.

The error of the creditors in assuming that the burden of proof was on the next of kin to show that the debts in question were not within the classes excepted from the operation of the discharge in bankruptcy is not a sufficient cause within the meaning of section 2481 of the Code of Civil Procedure for opening the decree settling the account of the administrator.

Application to open decree made upon judicial settlement of administrator's account.

* See 64 Misc. Rep. 217.

Henry Donnelly and Fred L. Eaton, for motion; Creighton S. Andrews, opposing.

DAVIE, S.—A decree was made judicially settling the accounts of the administrator July 14, 1909. Upon the return of the citation in the proceedings for judicial settlement several judgment creditors appeared, made due proof of the rendition and docketing of their respective judgments against the decedent and asked that the decree directing distribution should provide for the payment of their claims, there being sufficient assets to satisfy all demands against the estate, including the judgments. Thereupon the administrator, on behalf of himself and the other parties interested in the estate as next of kin, made due proof of a decree of the United States District Court in voluntary bankruptcy proceedings, which decree, after the usual recitals of jurisdiction and regularity, provided: "It is therefore ordered by the court that William P. Peterson be forever discharged from all debts and claims which by said act are made provable against his estate and which existed on the 16th day of October, 1900, on which day the petition for adjudication was filed, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy."

All of the judgments in question were obtained prior to such decree, in bankruptcy, and all were obtained upon demands properly provable in bankruptcy, but it was asserted on behalf of the judgment creditors that such decree had no application to their demands, the same not having been duly scheduled, nor legal notice given them in bankruptcy proceedings. No proof of such allegation was presented, however, by these creditors, they claiming that the burden of proof rested upon the administrator of showing affirmatively that these judgments did not come within the operation of any of the four exceptions specified in section 15 of the National Bankruptcy Act. It was

held by the surrogate that such contention was erroneous—that the burden of proof rested upon the judgment creditors of establishing the facts which brought their demands within the scope of such exceptions; and, accordingly, by the terms of the decree these judgments were excluded from participation in the distribution of the estate. The facts in such controversy are fully set forth in the opinion of the surrogate. *Matter of Peterson*, 64 Misc. Rep. 217. An appeal was taken from the surrogate's decree to the Appellate Division, where the decree was unanimously affirmed and the usual order of affirmance made and entered.

Subdivision 6 of section 2481 of the Code of Civil Procedure confers upon a Surrogate's Court the power "To open, vacate, modify or set aside or to enter, as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error or other sufficient cause. The powers conferred by this subdivision must be exercised only in a like case and in the same manner as a court of record and of general jurisdiction exercises the same powers."

The reasons assigned by the moving parties, upon which is based their application for relief in this case, are as follows: "The law was to a large extent unsettled in the State of New York at the time as to what jurisdiction the Surrogate's Court had in respect to such issue and as to the burden of proof. The Appellate Division passing upon the question in this case repudiates the doctrine laid down by the Appellate Division in the *Graber* case and holds that the Surrogate's Court has jurisdiction to determine the issues and that the burden of proof is upon the claimant to establish that they were not scheduled and that they had no notice of the proceedings or at least to that effect; that on account of the decisions in the State that existed at the time the matter was tried before the Surrogate the judgment creditors were justified in relying upon the

Graber case (Judge Hatch writing the opinion) and for that reason did not offer the schedules in bankruptcy proceeding or evidence to the effect that they had no notice or knowledge of the bankruptcy proceedings, and that that issue has not as yet been tried by the Surrogate; that on account of the unsettled condition of the law prior to the decision of the Appellate Division in this case and believing that the court had no jurisdiction to try the issues and on account of both parties taking that position before the Surrogate the judgment claimants and the attorneys for them neglected to make the proof that they could have made as to the schedule filed in the bankruptcy proceedings and as to notice or knowledge of the claimants of said proceeding."

Such application presents no inference of fraud, clerical error or newly-discovered evidence as a reason for opening the decree, but it is contended that the facts above quoted constitute a situation coming within the scope of the term "other sufficient cause," as used in the subdivision of the section of the Code above referred to. In other words, the moving parties take the position that they pursued a line of procedure on the trial of the matter before the surrogate, sanctioned to some extent by existing decisions, and it subsequently develops that such authorities were not followed or sustained. Such a state of facts does not warrant the granting of the relief sought. *Matter of Tilden*, 98 N. Y. 434; *Matter of Hodgman*, 82 Hun, 418-422; *Matter of Soule*, 72 id. 594-597; *Matter of Hawley*, 100 N. Y. 206; *Matter of Kranz*, 41 Hun, 463; *Furstman v. Schulting*, 38 id. 482; *Van Tassell v. N. Y., L. E. & W. R. R. Co.*, 1 Misc. Rep. 312; *Mills v. Huson*, 45 N. Y. St. Repr. 802-806; *Tigue v. Annowski*, 24 id. 931.

Even if this proposition were to be disposed of favorably to the applicants, it is very doubtful whether the Surrogate's Court has the right, at the present time, to grant the relief asked for, an appeal having been taken to the Appellate Division from the

surrogate's decree and the same having been affirmed generally by that court. Matter of Hodgman, *supra*; Sheridan v. Andrews, 80 N. Y. 648; Reed v. Reed, 52 id. 651; Hood v. Hood, 5 Dem. 50, 51; Matter of Westerfield, 61 App. Div. 413-419.

The application is accordingly denied and an order to that effect will be entered, but without costs to either party.

Application denied.

Matter of the Estates of JOHN SCHMIDT, Deceased, and of GOTTFRIED SCHMIDT, Deceased.

(*Surrogate's Court, Cattaraugus County, May, 1910.*)

**EXECUTORS AND ADMINISTRATORS—DEBTS AND LIABILITIES OF THE ESTATE—
ENFORCEMENT OF CLAIMS—EVIDENCE—CLAIMS BY RELATIVES AND PERSONS IN CONFIDENTIAL RELATIONS.**

Where one living in a family composed of her father, mother, brother and two sisters, upon a farm belonging to the brother, enjoying the same comforts and conveniences as the other members of the family and sharing with them the burdens involved in maintaining their common home, materially assists in the work of the household and performs various kinds of outdoor work out of proportion to the services performed by the other sisters, it is to be presumed, in the absence of any express promise, that the services were gratuitously performed, and they cannot form the foundation of a claim against the estate of the brother after his decease.

Proceedings on judicial settlement of administratrix's account and proof of personal claims.

George M. Lundy, for administratrix; Hastings & Larkin, for heirs at law and next of kin.

DAVIE, S.—Gottfried Schmidt died, intestate, October 15, 1907, leaving him surviving his widow, one son and four daughters, his only heirs at law and next of kin. At the time of his

death decedent owned twenty acres of land in the town of Olean, of the value of \$2,000, but possessed no personal estate, aside from household furniture of little value. Amelia Schmidt Cross, a daughter, was appointed administratrix September 10, 1909. The widow died February 21, 1909, leaving no estate. The son, John Schmidt, died, intestate, August 16, 1909, leaving no widow nor descendants, his sisters being his only heirs at law and next of kin. At the time of his decease he owned 100 acres of land of the value of \$2,400, and personal property of the value of about \$1,000. Mrs. Cross was appointed administratrix of his estate, September 10, 1909. Notice to creditors was duly published in both estates, and, upon the expiration of the time therein specified for presentation of claims, proceedings were instituted for judicial settlement in both estates; and in that connection the administratrix files a personal claim against the estate of the father for \$126 and one against the estate of her brother for \$546, and seeks to have the same allowed upon this accounting. The claim in each instance is for services, and the evidence adduced to establish the demand against the father's estate is less satisfactory than that in support of the demand against the estate of the brother; consequently the last-mentioned claim will be considered and the conclusion arrived at in that connection applied to both claims.

The daughter Mrs. Kratts was married March 24, 1897, and the daughter Mrs. Reitz September twenty-ninth of the same year. After being married, each of these daughters resided away from the family home; and thereafter the family consisted of the father, mother, John, and the two younger girls, Carrie and Amelia, all residing together upon the twenty-acre tract owned by the father. During the greater portion of the time covered by the services for which the claims are made, Carrie was employed at a manufacturing establishment, but assisted to some extent mornings, nights and Sundays in the work at home. The son, John, purchased the hundred-acre farm

July 26, 1902. Claimant became of age February 13, 1906. Before the purchase of the hundred-acre tract, the work on the twenty-acre homestead was performed by the members of the family, the father doing as much as his advanced age and enfeebled health would permit. After John purchased his place the two farms were operated together; and the evidence quite clearly shows that the claimant, from the time that she became of age to the death of her brother, not only materially assisted in the work of the household, but also performed various kinds of outdoor work, consisting of milking, cleaning stables, planting potatoes, assisting in the haying, and other manual labor. No doubt exists regarding the meritorious and laborious nature of the services rendered by her, nor can it be doubted that the amount of such services was beyond and out of proportion to the services performed by either of the other sisters. In good faith the other distributees of these estates should consent to some reasonable remuneration to the claimant, but they do not so consent — they stand on their strict legal rights; accordingly this controversy must be disposed of in accordance with the well-established rules covering the disposition of claims of this character. At the outset we are confronted with the well-recognized proposition that claims withheld during the lifetime of the alleged debtor and sought to be enforced after his death should be carefully scrutinized and allowed only upon satisfactory proof. *Kearney v. McKeon*, 85 N. Y. 136; *Maisenhelder v. Chrispell*, 105 App. Div. 219; *Rock v. Rock*, id. 157; *Matter of Liddle*, 85 Misc. Rep. 173; *Matter of Jones*, 28 id. 338; *Matter of Stewart*, 21 id. 412.

It clearly appears that, during all the time these services were being rendered, claimant and decedent were members of the same family; claimant after arriving at the age of twenty-one years continuing to remain at home, having and enjoying the same home comforts and conveniences as the other members of the family, and sharing with the others the burdens involved

in maintaining their common home. The case is absolutely destitute of proof of any express promise on the part of the decedent to pay for these services preceding their rendition. Under such circumstances the presumption exists that the services were gratuitously performed. The rule laid down in *Williams v. Hutchinson*, 3 N. Y. 312, was that "a contract or promise to pay as a matter of fact requires affirmative proof to establish it. Under certain circumstances when one man labors for another a presumption of fact will arise that the person for whom he labors is to pay him the value of his services. It is a conclusion to which the mind readily comes from a knowledge of the circumstances of the particular case, and the ordinary dealings between man and man. But where the services are rendered between members of the same family no such presumption will arise. We find other motives than the desire of gain which may prompt the exchange of mutual benefits between them, and hence no right of action will accrue to either party, although the services or benefits received may be very valuable. And this does not so much depend upon an implied contract that the services are to be gratuitous as upon the absence of any contract or promise that a reward should be paid."

The rigor of this rule was somewhat modified in *Moore v. Moore*, 3 Abb. Ct. App. Dec. 303. In that case the court said: "Ordinarily from the fact of the rendition and acceptance of services, beneficent in their nature, the law will imply a promise to pay what the services are reasonably worth. This implication may not be repelled wholly by the fact that the service is rendered to a parent by a son of full age; but the legal presumption of an obligation to pay is less strong when the relation of parent and child exists than in the case of dealings between persons not bound to each other. If to the relationship be added other circumstances tending to show as a matter of fact that the services were gratuitously rendered and without any expectation at the time on either side that payment was to

be made, the law will not imply a contract for compensation. A person cannot perform services intending them to be gratuitous and with a tacit understanding that no pecuniary charge is to be made and afterwards recover on a *quantum meruit* for such services."

The case last cited was followed in *Robinson v. Raynor*, 28 N. Y. 497, and in many other cases since, and may now be regarded as the true rule relating to the disposition of claims of this nature. There is no proof on behalf of the claimant that these services were rendered under any agreement for compensation. The witness Carter testifies that decedent came to him about six weeks before his death and said he wanted to have his will made and to give the hundred-acre farm to Amelia. In reply to Carter's inquiry as to why he wished to discriminate against his other sisters in favor of Amelia, decedent replied: "Amelia has always worked for me and has more than taken the place of a hired man." Carter then inquired if decedent had not paid her and decedent replied that he had not, but said that he had told her that when he got the place paid for he would make it right for anything she had done for him. These expressions on the part of decedent of appreciation of claimant's services and of a desire or intention on his part to make remuneration are of little consequence. They are simply expressions of testamentary intentions never consummated. They constitute no element of a contract, not having been made for the purpose of inducing the claimant to render the services. *Matter of Stewart*, 21 Misc. Rep. 412; *Matter of Dusenbury*, 1 Gibb. Surr. 208; *Maisenhelder v. Chrispell*, supra.

The only portion of decedent's declaration to Carter which has any probative force in this controversy is decedent's admission that "He told her that when he got his place paid for he would make it right for anything she had done." It is always unsatisfactory to uphold a liability against an estate upon proof of declarations alone. The courts have had occasion heretofore, and with good reason, to criticise evidence of this character. *Law v. Merrills*, 6 Wend. 268.

It is a primary rule of evidence that proof of oral admissions of a party is considered the weakest kind of evidence and always to be accepted with scrutiny and caution. 1 Greenl. Ev., para. 200, 201; *Stephens v. Vroman*, 18 Barb. 250; *Mich. Carb. Works v. Schad*, 38 Hun, 71.

Even if Carter's statement is absolutely correct in regard to decedent's admission to him that he had told claimant he would make it right with her for anything she had done for him, it is all left to speculation when he so told her — whether it was before she began the services or after their completion. The phraseology of the admission indicates quite clearly that such statement was made after the rendition of most of the services. Such admission is entirely insufficient to justify a finding that the services were rendered on account of such statement made to the claimant.

The evidence clearly shows that claimant voluntarily continued her residence with the other members of her family, after she became of age the same as before, doing practically the same line of work. She was receiving the advantages and benefits of a home and sharing with the others in the performance of the work to be done. The brother from time to time gave her small sums of money, not by way of meeting any contract obligations, but simply as a present or gratuity. Under all the circumstances disclosed by the evidence, however much one's sympathies may be enlisted by the apparent equities in favor of the claim, the law will not permit of a recovery upon either of these claims.

A decree will, accordingly, be entered, disallowing both claims. The particular form of the decree, together with the question of allowances to be made for the expenses and attorneys' fees upon this accounting, will be settled before me at my office in the city of Olean on the 12th day of May, 1910, at one o'clock in the afternoon.

Decreed accordingly.

**Matter of the Probate of the Last Will and Testament of JAMES
G. PERKINS, Deceased.**

(Surrogate's Court, Saratoga County, June, 1910.)

**CHARITIES—REQUISITES AND VALIDITY IN GENERAL—VALIDITY OF PURPOSE.
WILLS: DISPOSAL BY WILL—RIGHT OF DISPOSAL AND MATTERS DISPOSABLE
BY WILL—CORPORATIONS AND LEGAL ENTITIES: INTERPRETATION AND
CONSTRUCTION—TERMS DEFINING THE NATURE AND QUALITY OF ESTATES
OR INTERESTS—FIDUCIARY OR INDIVIDUAL, LEGAL OR EQUITABLE AND
OTHER QUALIFIED INTERESTS—TRUSTS IMPLIED—FROM PRECATORY WORDS.**

A provision of a will for the perpetual care of the testator's cemetery lot outside the State of New York and the lettering of the monument standing upon it is valid as a trust of the testator's personal estate.

The further provision that the remainder of his personal estate be disposed of by two persons named therein "as they think best, we having advised with them thereof, and left the disposal of any residue of our estate to their judgment as may seem best to them at that time," without any further directions to the legatees as to the disposition to be made of the estate by them, either secretly or by the terms of the instrument, suffices to pass the remainder and residue of the personal property to the legatees absolutely.

See 69 Misc. 509.

Proceeding for the probate of a paper offered as the last will and testament of James G. Perkins, and codicil thereto.

Irwin Esmond, for petitioner; Chambers & Finn, for James H. Perkins, nephew of deceased, contestant; William Rooney, special guardian, for Elizabeth Lincoln, grandniece.

OSTRANDER, S.—The instrument offered for probate is in the following words:

"The last Will and Testament of Rev. James G. Perkins and of his wife, Louisa D. Perkins, of Round Lake, N. Y., made and signed on August 17th, 1906.

"Sec. 1. Know all men by this writing that we, Rev. James

G. Perkins and his wife Mrs. Louisa D. Perkins of Round Lake, Saratoga County, New York, make this our last Will and Testament revoking all others.

"First: After all my just debts and funeral expenses are paid, our monument in Washington Street Cemetery in Fair Haven, Vermont, is properly lettered and perpetual care of the lot in the above named cemetery is secured; then the remainder of our personal and real estate and belongings are to be disposed of by Misses Augusta C. Capron and Lillian Capron of the City of Albany, N. Y., as they think best, we having advised with them thereof, and left the disposal of any residue of our estate to their judgment as may seem best to them at that time.

"Sec. 2: We appoint Miss Augusta C. Capron and Miss Lillian Capron of the City of Albany, N. Y., as the executrices of this our last Will and Testament.

"Sec. 3: In testimony whereof we have subscribed our names on this Seventeenth day of August in the year of our Lord, 1906, in the presence of the following witnesses.

"JAMES G. PERKINS,

"LOUISA D. PERKINS.

"Witnesses: We, Rev. Jacob M. Appleman and Libbie C. Appleman witnessed the signing of the above names of Rev. James G. Perkins and Louisa D. Perkins, they declaring the foregoing to be their last Will and Testament.

"JACOB M. APPLEMAN,

"LIBBIE C. APPLEMAN,

"Witnesses.

"Sec. 4th: Further I, Rev. James G. Perkins, confirming all of the conditions of the foregoing joint will of myself and of my wife Louisa D. Perkins, do will and declare, that if I should die before my wife Louisa D. Perkins, that she shall be possessed of all my real and personal estate without probate during her natural life.

"(Signed)

JAMES G. PERKINS.

"Witnesses: We, Rev. Jacob M. Appleman and Libbie C. Appleman witnessed the signing of the above name of Rev. James G. Perkins, he declaring the same to be a part of his last will and testament.

"JACOB M. APPLEMAN,

"LIBBIE C. APPLEMAN,

"Witnesses."

There is practically no contention against the testamentary capacity of the deceased, nor as to the due execution of the will, but construction of the instrument is asked upon the probate.

Under the decisions, *Matter of De Witt*, 113 App. Div. 790-793, and *Matter of Merriam*, 136 N. Y. 58, the will must be admitted to probate as a will valid to dispose of real property, regardless of the construction which is to be given to its provisions, as the surrogate has no jurisdiction to construe it so far as the disposition of the real property is concerned.

It is contended by contestants that the provisions of the will in reference to the lettering of the monument and the perpetual care of the lot of the deceased in the cemetery at Fair Haven, Vt., are invalid, because the implied trust is to be administered without the State of New York, and for the reason that the trust provides for the improvement of a cemetery lot in perpetuity. But under the provisions of sections 113 and 114 of the Real Property Law a trust for the purpose of lettering the monument and the perpetual care of the lot is not invalid if the same were to be administered within this State. And as the trust operates upon personal property in this State, to be expended for the purposes mentioned without the State, I think, in accordance with the opinion of Judge Houghton in *Catt v. Catt*, 118 App. Div. 472, that the provisions of the instrument in question created a valid trust as to the part of the personalty necessary to provide for the lettering of the monument and the care of the lot. This trust can be administered by the Supreme Court.

As to the provision of the will that the remainder of the real and personal estate be disposed of by the Misses Capron "as they think best, we having advised with them thereof, and left the disposal of any residue of our estate to their judgment as may seem best to them at that time," it is contended that there is a secret trust imposed by these words upon the property thus mentioned, and that such trust is void for uncertainty, since no beneficiary is designated. And the contestants cite *Gross v. Moore*, 68 Hun, 412; *aff'd*, 141 N. Y. 559; *Tilden v. Greene*, 130 id. 29.

In all these cases there was a direction to the legatee as to the disposition to be made of the estate, either secretly or by the terms of the instrument.

In the case at bar there is no direction given, and it is expressly provided that the property shall be disposed of by the legatees as they see fit. This language seems to bring the case within the provision of section 136 and section 150 of the Real Property Law, which provides that "a general or special power is beneficial where no person other than the grantee has, by the terms of its creation, any interest in its execution." Section 136. "Where a like power of disposition is given to a person to whom no particular estate is limited, such person also takes a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers and incumbrancers." Section 150.

Under the provisions of section 11 of the Personal Property Law, as a similar enactment was construed by the Court of Appeals in *Cutting v. Cutting*, 86 N. Y. 522, the same rule applies to a bequest of a power affecting personal property as to one affecting real estate.

I therefore conclude that the instrument in question passed an absolute title to the remainder and residue of the personal property to the Misses Capron, subject to the life estate of the widow, Louisa D. Perkins, and that the instrument in question

is a will valid to pass the personal property of the deceased for the purposes therein mentioned.

Let findings and decree be prepared accordingly.

Decreed accordingly.

Matter of the Application of EDWIN E. HIGGINS, to Revoke the Letters of Administration of GERTRUDE S. SHARP, Otherwise KNOWN as GERTRUDE S. HIGGINS, as Administratrix of THOMAS C. HIGGINS, Deceased.

(Surrogate's Court, Kings County, June, 1910.)

**JUDGMENT—COLLATERAL ATTACK—WANT OF JURISDICTION—EFFECT OF RE-
CITALS IN JUDGMENT RECORD.**

The statement contained in a judgment of divorce granted in a foreign State that the defendant failed to appear is conclusive upon the plaintiff; and a waiver of service of notice of taking depositions in the action filed therein and purporting to be signed by the defendant's attorney does not suffice to establish the fact of the defendant's appearance.

But where the record of the foreign court was thereafter, on the plaintiff's motion, duly corrected by striking out such statement from the judgment and inserting in its place a statement that the defendant appeared personally in the action, full faith and credit should be given thereto, and the plaintiff's subsequent marriage in this State is to be held valid and her right to administer upon the estate of her husband by such marriage should be upheld.

Application to revoke letters of administration.

Sparks & Fuller, for Edwin E. Higgins; Jay & Smith (Alfred G. Reeves, of counsel), for Gertrude S. Higgins.

KETCHAM, S.—This is a proceeding by the next of kin to set aside letters of administration granted to the respondent as the widow of the intestate. The question is presented whether or not she is the widow of the intestate, and this depends upon the

validity and effect of a judgment of divorce in the respondent's favor against a former husband, which was rendered before she entered upon the ceremony of marriage with the intestate.

The respondent was married to Frederick W. Sharp on December 12, 1888. In an action brought in the Court of Common Pleas of Montgomery county, in the State of Ohio, in which this respondent was plaintiff and Frederick W. Sharp was defendant, a judgment of absolute divorce was entered upon grounds sufficient therefor under the laws of Ohio, but insufficient for a like judgment under the laws of this State.

In that action the defendant was served by publication and not personally.

A ceremony of marriage was solemnized between the intestate and the respondent on June 19, 1894. After the death of the intestate letters of administration upon his estate were granted to the respondent.

A son of the intestate, born to him by a wife who preceded the respondent, applied for the revocation of these letters; and the same were revoked upon a finding that, at the time of her marriage to the intestate, the respondent was the wife of Frederick W. Sharp; that the decree of divorce was ineffectual, and that she was not the intestate's widow.

The copy of the record then exemplified from the Ohio court showed that, before the entry of the judgment of that court and after notice that depositions would be taken in the State of New York to be used as evidence in the trial of the case, a paper was filed in the action which was as follows:

"Service of the above notice is acknowledged and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived; also all exceptions as to time. Done this 15th day of June, A. D. 1892.

"FREDERICK W. SHARP,

"By JOHN ANDREWS, *his attorney.*

"JOHN ANDREWS, *Atty. for Deft.*"

It also appeared, from a like source, that the judgment in the action proceeded upon a recital in the words "the defendant having been legally summoned by publication and having failed to appear."

Upon these facts the conclusion of this court was that "whatever may otherwise have been the significance of the statement signed in the defendant's name it could have no force against a declaration contained in the judgment that the defendant had failed to appear;" and the respondent's letters were revoked. Thereafter, the proceeding was reopened and now comes on upon the evidence formerly taken, with such evidence as has been presented on the last hearing.

An exemplified copy of the record of the Ohio court is now produced, from which it appears that, since the revocation of the respondent's letters, the judgment of divorce has been amended *nunc pro tunc* by striking therefrom the words reciting the failure of the defendant to appear and inserting in place thereof a recital that the defendant had entered his appearance in the action.

The order by which this amendment was directed was prayed for by Mrs. Higgins, upon her allegation that the judgment was made and entered upon the journal by inadvertence, mistake or irregularity on the part of the clerk or scribe or person writing said entry; that the same was not the judgment order and decree at that time made by the judge of the court who then heard and determined the cause, and that the error and mistake in said entry consisted in the recital "having failed to appear," whereas the fact was, and the court at that time so found, that the defendant, Frederick W. Sharp, did enter his appearance in the case and was for the purpose of adjudication personally before the court.

Upon the motion for amendment the defendant, Frederick W. Sharp, appeared by attorney, through such attorney accepted notice of the said motion, made an application in sup-

port thereof and undoubtedly promoted and assisted the application. It appears from the Ohio record, as well as the testimony before this court that, since the judgment of divorce, Frederick W. Sharp has contracted a marriage.

Subsequently, counsel for the next of kin of Thomas C. Higgins, the intestate, applied to the court of Ohio to vacate and set aside the *nunc pro tunc* entry or order modifying and correcting the original final judgment; and, after a rehearing of the matters involved in the making of said *nunc pro tunc* entry, the court, after hearing counsel of said next of kin, did find that the said application was not well taken and should be overruled, and did find, order, decree and adjudge that said application of the next of kin aforesaid was overruled and denied, and the *nunc pro tunc* entry or order modifying and correcting the original decree was thereby allowed to stand and was thereby confirmed.

If full faith and credit be given to the record now duly presented, this court must find that, on July 19, 1892, in a court of competent authority, of plenary jurisdiction of the subject-matter and of the person of the defendant, in an action in which the respondent, then Gertrude S. Sharp, was plaintiff, and her husband, Frederick W. Sharp, was defendant, a judgment of absolute divorce was entered. The record is that before the judgment was entered the defendant had entered his appearance in the action and had thus submitted his person to the jurisdiction of the court, and that the court then recognized and found that he had entered his appearance and based its decree, then reached, upon such appearance.

It would involve an affront to the record and a refusal of the full faith and credit to which it is entitled if this court should fail to follow and accept the judicial averment proceeding from a court of a sister State that notwithstanding the original recital of the lack of appearance the decretal act of the court did in truth proceed upon the fact of appearance.

Against this, it is said that the amendment *nunc pro tunc* was obtained in fraud of this court and of the next of kin of the intestate; but the complete answer to this is that, since the defendant actually appeared in the action, it is impossible that the allegation of such appearance, or the taking of any appropriate relief based thereon, could partake of the essence of fraud or any wrong.

It is also claimed that the amendment was brought about by the collusion of the parties to the action, and it is obvious that both of them did join their endeavors to prevail upon the court to make the order *nunc pro tunc*. Again, it must be said that all they did was to assert the truth and to take such relief as the truth justified and required. Concert of action may sometimes be collusion, but a united effort to tell the truth and to conform a judgment to the fact which supports it lacks every covinous element.

The defendant had married again after the original judgment; and, if he were faithful to his new relation, he would want the amendment. The only honest position for him to assume was that of frank advocacy, while falsehood might well have been imputed to him if he had professed opposition or indifference.

Whatever may have been the motive of the motion, whatever may have been the grounds upon which the court was invited to consider the proposed correction of the judgment, whatever may now or hereafter be the effect of the amendment upon the parties or third persons, every such consideration seems to sink into irrelevance in view of the dominant truth which the court in Ohio found and which this court must adopt, that there had been an appearance by the defendant and there had been a judgment rendered upon actual jurisdiction of the defendant's person.

The petitioner makes the proposition that an absolute divorce, granted in a foreign State, upon grounds not recognized

in this State, will not be recognized by the courts of this State as an absolute divorce, and that such divorce will be given only such effect within this State as if the action had been brought here upon the same grounds. No suggestion to support this view has been found in the cases cited in its behalf.

Though constrained by the State of the record of the court of a sister State, it is still without any sense of regret or reluctance that this court finds the respondent, Gertrude S. Higgins, to be the lawful widow of the intestate and denies the application for the revocation of her letters of administration.

Application denied.

Matter of the Appraisal Under the Transfer Tax Acts of the
Property of GEORGE SHIELDS, Deceased.

(*Surrogate's Court, Kings County, June, 1910.*)

TAXES—INHERITANCE AND TRANSFER TAXES—ASSESSMENT—APPRAISAL—
DEDUCTION OF ADMINISTRATIVE EXPENSES; DEDUCTION OF DOWER.
WILLS—INTERPRETATION AND CONSTRUCTION—CONDITIONS, CONTINGENCIES
AND ALTERNATIVES—RULES AND IMPLICATIONS—INTENTION TO CUT OFF
DOWER.

The devise by a testator of his real estate to his executors, in trust to receive and apply the income to the use of persons other than his widow, and a power of sale incidental thereto, are not inconsistent with a claim of dower on the part of his widow; and the gift to the widow of all his personal estate is not enough from which to infer an intention that it was to be in lieu of dower.

In such a case, in appraising the testator's real estate for the purposes of the transfer tax, the value of the widow's dower should be deducted.

If an expenditure for broker's commissions should appear to be reasonably required upon the sale of the real estate by the executors, it should be deducted as well as the commissions of the executors as trustees under the will.

Appeal from an order of the appraiser imposing the transfer tax.

William H. Stryker, for appellants; William W. Wingate, for State Comptroller, respondent.

KETCHAM, S.—The executors appeal from the order by which the transfer tax was imposed, and assign as error that the tax upon the transfer of the decedent's real estate was measured by the value of the lands, without deduction of the widow's dower, and that no deduction was made for the commissions of a broker upon the sale of real estate or for the commissions of trustees.

The will gave to the widow all the decedent's personal estate "to use and enjoy the same and all income therefrom during her natural life." It devised all the real estate to the executors under a perfect trust to dispose of the income and ultimately the principal for the benefit of persons other than the widow. It contained a direction to the trustees to sell or rent the real estate; and this was supplemented by a power in the executors to sell or mortgage any part of the real estate for the purpose of paying off mortgages, liens, charges or incumbrances and "to make, execute and deliver goods and sufficient deeds, bonds and mortgages * * * for all said purposes."

The will contained no direction that the provision therein in favor of the widow should be in lieu of dower.

The Comptroller claims that the widow was put to election between her dower and the provision in her favor in the will. There is no indication in the will that the testator did not intend that his wife should have both her dower and her life estate in the personalty. The case is controlled by *Konvalinka v. Schlegel*, 104 N. Y. 125.

It is argued for the Comptroller that the trust in the lands so clearly contemplated complete control by the trustees of the entire title to the exclusion of the dower that the widow was thereby required to elect.

If an election be necessary it is not "because the vesting of

the title in trustees was *per se* inconsistent with a claim for dower, but for the reason that the will made a disposition of the income, and contained other provisions which would be in part defeated if dower was insisted upon." *Konvalinka v. Schlegel*, *supra*.

The language of the court in the case cited, used with regard to a power in trust to sell lands and distribute their proceeds, is equally applicable to a power of sale which is incidental to a trust to receive and apply the income. This language is: "The mere creation of a trust for the sale of real property and its distribution, is not inconsistent with the existence of a dower interest in the same property. There is no legal difficulty in the trustee executing the power of sale, but the sale will necessarily be subject to the widow's right of dower, as it would be subject to any outstanding interest in a third person, paramount to that of the trustee." *Konvalinka v. Schlegel*, *supra*, 130, 131.

In the cases in which the duty of election has been imposed upon the widow, there was plain expression in the will of an intention that the trust should embrace the entire title and that the testamentary gift to the widow should take the place of the provision to which she was by law entitled.

In *Vernon v. Vernon*, 53 N. Y. 351, the following features of the will were marshaled by the court as *indicia* of such purpose: There was a devise to the wife in fee of a portion of the lands of which she was dowable; the remaining lands were charged with an annuity to the wife, for life, to pay which required more than the income from the property; and the executors were given a power of sale of certain real estate held by the decedent with his partner at a price fixed in the will or to take conveyance from the partner at the same price in the adjustment of the decedent's interest in his firm.

In *Savage v. Burnham*, 17 N. Y. 561, the whole estate, in which real estate was included, was devised, in trust, among

other things, to pay to the wife, for life, one-third of the clear rents and profits; and the court said that the claim of dower in the same lands could not stand consistently with the trust provisions.

Tobias v. Ketchum, 32 N. Y. 319, as explained and restricted in the *Konvalinka* case, *supra*, held merely that the widow was put to her election only because certain provisions of the will would have been in part defeated if dower was insisted upon.

It is thus clear that only a manifest purpose in the will which would fail if dower were demanded will lead to a construction which requires an election.

In the will at bar, the devise is of "all of my real estate." This expression is many times repeated. There is nothing in the words quoted, or in their context, to indicate that the testator contemplated anything more than his lands as they would stand at his death, subject to the estate of dower.

It is argued in behalf of the Comptroller that the direction to sell lands for the purpose of paying off mortgages and other liens and to make good and sufficient deeds for the said purpose indicates a scheme which could not be fulfilled unless the deeds were sufficient to convey the entire title.

The answer to this is that, if the trust concerned only the quality of the estate of which he died seized, the good and sufficient deeds which were directed to be given were such deeds as were sufficient to convey that of which he died the owner.

If these views are correct, the value of the wife's dower, since it is not taxable, should be deducted from the gross value of the lands.

As to broker's commissions on sale of real estate, if it shall appear upon the rehearing before the appraiser that the expenditure for broker's commissions is reasonably to be required, the amount thereof should be deducted. The sole question is whether or not it can be found as a fact that the executors are about to incur a necessary expense on the sales which they may be required to make under the will.

The executors contend upon this appeal, though their claim in this respect was not apparent before the appraiser, that, in ascertaining the subject of taxation, commissions to the trustees as such should be deducted. The amount of these commissions should be ascertained and it should undoubtedly be subtracted from the subject of taxation.

The matter is referred to the appraiser for readjustment.

Matter referred to appraiser for readjustment.

Matter of the Property of BRIDGET M. WOOD, Deceased, Subject to Tax Under the Taxable Transfer Acts.

(Surrogate's Court, Monroe County, June, 1910.)

LIMITATION OF ACTIONS—ACCRUAL OF CAUSE OF ACTION—ACTION AGAINST COTENANT FOR CONTRIBUTION.

TAXES—INHERITANCE AND TRANSFER TAXES—ASSESSMENT—APPRAISAL—DEDUCTION OF AMOUNT OF CONTRIBUTION DUE COTENANT FOR IMPROVEMENTS.

The liability of a tenant in common to contribute to the cost of improvements made by his cotenants is not barred by the Statute of Limitations as long as the cotenancy exists.

In appraising the interest of one of several cotenants of real property for the purposes of the transfer tax, allowance should be made for contribution for improvements made by cotenants, though not within the statutory period.

Appeal from an order of an appraiser assessing the transfer tax.

Charles M. Williams, for appellant; William T. Plumb, for State Comptroller.

BROWN, S.—This is an appeal from an order made in the above-entitled matter upon the report of Hon. Robert Averill, appraiser, which order was entered on December 2, 1909. It is claimed by the appellant that the property of the decedent

is assessed too high. It appears that the estate of the decedent consisted solely of her interest in real estate which she inherited with her brother and sister from their mother. After the mother's death the property was improved by the erection of buildings by the cotenants. The decedent had no funds and was unable to join in furnishing money for the building. The appraiser allowed \$4,000 for money advanced by one of the cotenants to help build a building, Nos. 114, 116 Scio street, which building was a part of the common property, but the decedent had paid nothing or put up nothing to offset said \$4,000 furnished by the cotenant for the building thereof. I think this action on the part of the appraiser was correct, but the objection of the appellant is that he did not allow \$8,098.80 more, which some thirty years ago was paid by a cotenant of Mrs. Wood, the ancestor of the cotenants of the decedent, at the time of her death. It appears in evidence that such \$8,098.80 was expended for new buildings on the premises owned in common by the decedent and her cotenants; that said \$8,098.80 was not offset by any similar or other contribution on behalf of the decedent in the building of such building; that the families lived in common and had no accounting between one another. I assume that the reason why the appraiser did not allow this \$8,098.80 is that the claim was so old that he assumed that the Statute of Limitations applied and he had no authority to allow it. If this was his reason, he was in error, for the Statute of Limitations does not apply to partition actions and accountings in partition actions, so long as the relation of cotenancy exists. It is subject, during its existence, to equitable accounting during its entire continuance. 21 Am. & Eng. Ency. of Law (3d ed.), 1174, subd. b, note 4.

It has been held "that each tenant in common is not only vested with the title to his undivided interest in the common estate, but each holds a contingent interest in the entire title until all equities relating to the tenancy are adjusted. Thus, if one

tenant has made necessary and lasting improvements on the common estate, or has paid the taxes legally assessed against it, he will hold the title of his cotenants until he is reimbursed; or, if the property has passed by descent and one of the heirs has received advancements, he must account for the advancements, and the other heirs will hold his title until their respective interests can be equalized in a partition proceeding."

Accordingly, it appearing that such improvements were made to the property, and considering the relations of these parties, living where each presumably knew what the other was doing, and the one having no property with which to make such improvements, the other cotenants and their privies would be entitled upon a partition action to have such improvement made upon the property allowed to them before a division of the proceeds, and the Statute of Limitations would not be a defense to such allowance. *Ford v. Knapp*, 102 N. Y. 142; *Jones v. Duerk*, 25 App. Div. 551; *Satterlee v. Kobbe*, 173 N. Y. 91.

The State of New York should tax only that which belonged to the decedent at her death; and, if as between the parties there were equitable rights which would cut down the value of the real estate of the decedent, only the balance of such interest should be taxed. Notwithstanding the fact that no proceeding has been commenced, and notwithstanding the fact that it might be claimed that no contribution would ever be asked, nevertheless that does not justify the taxation of property that the decedent did not own and which does not pass to the heirs at law as her property; for from the authorities above cited I am of the opinion that the cotenants could require contribution, and, if they did not, that would be a matter of graciousness on their part and would not increase the value of the estate of the decedent passing upon her death subject to the Transfer Tax Law.

I accordingly reduce the amount of the value of the property of the decedent, as fixed by the order herein on the report of

the appraiser, by the sum of \$8,098.80, being the amount of advancements made by cotenants in the building or buildings upon the common property, not allowed by the appraiser.

The appeal is also for the reimbursement of payments made for taxes by Mr. Kavaney. I disallow this, on the ground that these taxes paid by him were payments made by a person not a party to the title, in other words, not a cotenant, and that any payments made by him are rather in the character of a loan than of a payment which entitled him to a lien on the land. I accordingly disallow the appeal on that item.

Let an order be entered herein amending the order appealed from in accordance with this decision, without costs to either party as against the other.

Ordered accordingly.

**Matter of the Sale of Real Estate to Pay Debts, Etc., of
MARGARET RIDER, Deceased.**

(Surrogate's Court, Oneida County, June, 1910.)

**SUBROGATION—VOLUNTARY PAYMENT—PAYMENT OF DECEDENT'S DEBTS BY
ADMINISTRATRIX.**

An administratrix by voluntarily paying off and discharging with her own funds debts of the decedent does not become entitled to be subrogated to the rights of the creditors and to assert their claims in proceedings for the sale of the decedent's real property for the payment of his debts.

Proceeding to sell real estate to pay debts.

O. G. Irish, for Ella Rider Theeringer, administratrix; A. S. Malsan, for William S. Cobb, creditor, et al.

SIXTON, S.—On the return of the citation in a proceeding to sell real estate for payment of debts, a cited creditor, William

S. Cobb, objected to the allowance of the following claims: School tax, \$8.73; Whitesboro Water Works, \$19; J. L. Pickett, \$44.65; corporation tax, \$19.48; C. C. Boff, \$10.50; Ella R. Theeringer, \$333; Margaret Rider, \$333, and William F. Rider, \$333, on the ground that said claims are not valid claims against this estate.

In a proceeding of this character the rights of creditors are confined, after becoming parties, to presenting their claims, or objecting to those of other creditors. Code Civ. Pro., § 2755; Matter of Campbell, 66 App. Div. 478.

In this proceeding the surrogate has jurisdiction to determine the validity of all claims against the estate. Matter of Haxtun, 102 N. Y. 157.

Upon the trial, the claims of J. L. Pickett, C. C. Boff, corporation tax and school tax were disallowed by consent and the claim of Whitesboro Water Works was allowed by consent at seventeen dollars and eighty-eight cents, so that the only question to be determined is whether the said claims of Ella R. Theeringer, Margaret and William F. Rider, who are the children of the deceased, are valid claims against the estate.

The evidence shows that said Ella R. Theeringer, the administratrix, and her said brother and sister received \$1,000 from insurance upon the life of their mother, which they shared equally and all of which they pooled to pay off a real estate mortgage and two promissory notes, matured obligations of the deceased. They now seek reimbursement out of the estate on the theory that, by paying these claims, they succeeded to the rights of the creditors of the estate whose claims they had paid.

It is claimed by the contestant that all of these payments were voluntary and cannot be recovered back, and that this estate cannot be charged with the amount so paid.

The administratrix testified that she personally paid the mortgage with the equal contributions of herself, brother and

sister and took a satisfaction of the same; that in the same manner she paid two notes, and that no demand or request of any kind had been made upon her, or at all, for payment of any of these obligations of the estate. These obligations of the estate were not paid by the administratrix, as such, but by her as an individual, acting for herself and brother and sister. No assignment of the mortgage and notes so paid was taken by her. She took a satisfaction of the mortgage and had it recorded and a receipt for the payment of one of the notes, and never has had the note. These were all obligations of this estate held by creditors. It was the duty of the representative of this estate to pay these claims as such out of estate property. By voluntarily discharging the duty of this estate, by individually paying claims against this estate, such a person cannot thereby become a creditor of this estate.

"No person can make himself a creditor of another by voluntarily discharging a duty which belongs to that other to perform, and no debt can be implied in law from a voluntary payment of the debt of another." *First Nat. Bank of Ballston Spa v. Board of Suprs.*, 106 N. Y. 488.

It is an elementary principle in such actions that money voluntarily paid out by one for another cannot be recovered back. 1 Pars. Con. 471 et seq. In order to support such an action, it is essential that a request on the part of the person benefited, to make such payment, either expressly, or fairly to be implied from the circumstances of the case, must be proved. *Add. Cont.* 1055; *Wright v. Garlinghouse*, 26 N. Y. 539; *Wellington v. Kelly*, 84 id. 546; *City of Albany v. McNamara*, 117 id. 168; *Matter of Hotchkiss*, 44 App. Div. 615.

I, therefore, hold and decide that the payment of claims against this estate by Ella R. Theeringer, Margaret Rider and William F. Rider were voluntarily made, hence are not legal claims against this estate and are disallowed.

Decreed accordingly.

Matter of the Estate of WILLIAM G. FARGO, Deceased.

(*Surrogate's Court, Erie County, June, 1910.*)

EXECUTORS AND ADMINISTRATORS—DISTRIBUTION AND DISPOSAL OF PERSONAL ESTATE—COMPUTATION AND ADJUSTMENT OF INTERESTS AND DISCHARGE THEREOF—CHARGES BINDING ON INCOME OR PRINCIPAL; COMMISSIONS.

The commissions of executors should be charged against the corpus of the estate and no part thereof against a trust fund formed out of the same, the income from which is to be paid to a designated beneficiary, in the absence of any direction in the will to the contrary.

Where executors, who are also testamentary trustees, have agreed with all the persons interested in the estate to accept a gross sum annually in lieu of their fees and commissions in both capacities, and the accounts submitted do not afford ground for an accurate computation, the agreed compensation should be apportioned equally between principal and income.

The expenses of an intermediate accounting will be charged to income.

The expenses incidental to the conversion of real property should be charged to the principal.

Proceeding for the judicial settlement of the accounts of executors and testamentary trustees.

Louis L. Babcock, for Franklin D. Locke, executor and trustee; Jacob Stern, for James C. Fargo, executor and trustee; John Larkin, for objectants; Joseph G. Dudley, special guardian, for infants.

HART, S.—The testator, William G. Fargo, died during the year 1881, leaving a last will and testament, wherein he devised his residuary estate in trust to be divided in three separate parts, the income of one part to be applied for the use of his grandchildren, the contestants, Anna E. Albree and Mary O. Balliett, for life, with power to them upon attaining the age of thirty years to dispose of the same absolutely by will. The

other two parts were devised in trust for the use of two daughters of the testator, both of whom are dead, and the trust estates held for them have been distributed, with the exception of a large amount of real property of the decedent, which has not yet been sold by the executors.

The executors and trustees have filed annual accounts of their proceedings as such, and the contestants have filed objections to the accounts for the years 1904, 1905, 1906, 1907, 1908 and 1909.

The item contained in the accounts to which objections are made may be classified as follows: 1. Taxes on vacant property; 2. Local assessments; 3. Fire insurance; 4. Commissions of executors and trustees; 5. Expenses of various accountings; 6. Miscellaneous expenses.

The residuary estate consisted of real and personal property. The property known as the Mansion property was vacant and unproductive, and the Cook county property, consisting of a farm on the outskirts of Chicago, practically unproductive; both pieces of property being held by the executors and trustees in the hope of realizing an adequate price. The Mansion property has recently been sold, while the Cook county property is still held by the executors.

Objections were filed by the life tenants to the accounts of the executors and trustees for the year 1896, which resulted in an action being brought in the Supreme Court by the executors and trustees for instructions as to the disposition of the real estate of the testator, and a judgment was rendered directing the executors to offer for sale, at public auction, all the lands of the testator, excepting the Cook county property, and fixing the market value of the same.

The sixth clause of the judgment provided that, until such lands be sold, the executors and trustees "pay the taxes and assessments levied on the unsold portions thereof; keep the buildings thereon in proper repair, and adequately insured; and

make any and all disbursements necessary in connection with the preservation and proper maintenance thereof; that such payments and disbursements be made out of the revenues of said real estate, and if they shall be insufficient therefor in any given year that the deficit be paid from the proceeds of the sale of real estate for that year."

Several accountings have been had in the Surrogate's Court since this judgment was rendered and decrees have been entered approving the accounts of the executors and trustees up to the year 1904. Decrees have been entered settling their accounts for the years 1904 and 1905, reserving, however, to the contestants the right to reopen such decrees for the purpose of taking proof in support of the objections. Meanwhile, the contestants made application to the Supreme Court to strike out this provision of the judgment and for an accounting of all payments made thereunder, and to have refunded to them such portion thereof as might be charged to capital of the estate were it not for this provision.

This application was denied by the Supreme Court and the judgment remains in full force.

The contestants were of full age and appeared by attorney in that action and were represented in court at the time the judgment was made. In my opinion, they are bound by the provisions thereof and estopped from objecting to the payment of these items by the trustees, at least, in so far as the first three classifications are concerned, and the objections to these items are, therefore, overruled.

The remaining items contained in the accounts of the executors and trustees, to which objections are made, consist of executors' and trustees' commissions, legal expenses appertaining to accountings and miscellaneous expenses, all of which have been charged against income.

Article seventh of the will creates the residuary trust fund and divides it into three parts. Under subdivision "C" the

executors are directed to apply the net income, issues and profits, or so much thereof as in their judgment shall be necessary, in equal proportions to the support, maintenance and education of the contestants, granddaughters of deceased, or the survivor of them, until they shall attain the age of twenty-one years. When they, or the survivor of them, attain their majority the accumulation of income is directed to be paid to them, and thereafter he directs that the "entire rents, income, issues and profits of said part be applied semi-annually to the use of my said granddaughters, or the survivor of them, so long as they, or the survivor of them, shall live. * * *

But in case either of my said granddaughters shall live to attain the age of thirty years, then I expressly direct, notwithstanding anything hereinbefore contained, that she shall have the power of disposing of the principal sum, which shall be held in trust for her at the time of her decease under this article of my will, by her last will and testament."

Article twelfth of the will, after naming the executors, contains the following provisions relating to their compensation as executors: "I hereby direct that they shall be paid out of my estate from time to time such sums as shall be a proper compensation for their services without regard to the statutory fees."

This estate has been in process of administration more than twenty-five years, and the executors have received compensation at the rate of \$6,000 and \$5,000 per annum, this compensation being stipulated by them to be in full of executors' and trustees' commissions, both on principal and income. The reasonableness of the amount and the propriety of the charge are not questioned, excepting as to what account it shall be charged. Annual accountings have been had and the commissions or compensation was for a period of years charged to principal; latterly and for the majority of years it has been charged to income. There can be no doubt that the corpus of the es-

tate is properly chargeable with executors' commissions, there being no direction contained in the will to the contrary.

The trust fund directed to be created and which is incomplete after the expiration of years is chargeable with net income for the life tenants. It is my belief that the testator intended his grandchildren should receive the income of the trust created for them, less the necessary and proper charge for its administration, not that the income should be charged with the expense of administering the estate as well as the trust fund.

The law seems well established that each part of an estate should bear its burden of the expense of administration. Income should not be burdened with the full amount of the compensation of the executors and trustees, while principal escapes entirely. The life beneficiaries who are objecting to the various charges against their income now have the absolute power of disposition of the principal by will, both having arrived at the age of thirty years, and the presumptive remaindermen who are represented by special guardian may be extinct or divested by will of the entire trust fund, which has been so carefully conserved, when the final day for distribution arrives.

I am, therefore, of the opinion that the annual compensation paid to the executors should be apportioned equally between principal and income. There is no specific direction in the will that this compensation should be paid from income—it is as executors they are directed “to be paid out of my estate”—and, while this apportionment may not be accurate, an exact computation being impossible from the accounts submitted, this adjustment will afford some relief to the life tenants until their trust fund is assembled.

The ordinary legal expenses of accounting may be charged to income.

The miscellaneous expenses to which objection is made, all items relating to the sale of real estate, brokers' commissions, surveys, mortgage tax and recording fees, will be charged against principal.

The allowances made to special guardians are not proper charges against the income account and will be charged to principal, that being the only part of the estate in which the infants have an interest.

A decree will be entered modifying the accounts of the executors and trustees as herein directed; all other objections to the accounts are overruled.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of KINGS COUNTY TRUST COMPANY, as Executor of and Under the Last Will and Testament and Codicil Thereto, of WILLIAM HOWARD, Late of the County of Kings, Deceased.

(Surrogate's Court, King's County, June, 1910.)

EXECUTORS AND ADMINISTRATORS—DISTRIBUTION AND DISPOSAL OF PERSONAL ESTATE—INTEREST ON LEGACIES AND SHARES—LEGACIES TO WIDOW, CHILDREN OR DEPENDENT PERSONS.

Where a trust is created by a testator for the benefit of his widow for and during her natural life, the income therefrom should be paid to her from the time of his death.

Proceeding upon the judicial settlement of an executor.

George V. Brower, for executor; Lyon & Smith (Edward P. Lyon, of counsel), for Anna P. Howard, widow.

KETCHAM, S.—There was a gift in trust of \$32,000, to pay the income thereof to the widow "for and during her natural life."

While, practically, a trust fund may not be released from the burdens of administration until the expiration of a year or more after the grant of letters, yet in the vision of the law the trust is in progress from the testator's death, unless a con-

trary intent is apparent in the will. If this were not so, the time when the income should become payable would be subject to the caprice or neglect of executors or casual delays in the probate.

Hence, the income which accrues between the death and the time when in the convenience of events the trust fund is actually separated from the possession of the executors as such is payable to the beneficiary, unless a contrary intent appears in the will. *Matter of Stanfield*, 135 N. Y. 292; *Bank of Niagara v. Talbot*, 110 App. Div. 519; *Matter of Harris*, 61 Misc. Rep. 563.

It has not been possible to discern in the will or codicil here presented any purpose that the widow should not receive the income from her husband's death, and it should be paid to her.

Decreed accordingly.

Matter of the Judicial Settlement of the Accounts of THE FARMERS' LOAN AND TRUST COMPANY, as Executor, etc., of ANDREW J. SMITH, Deceased.

(Surrogate's Court, Rockland County, June, 1910.)

WILLS—INTERPRETATION AND CONSTRUCTION—TERMS FIXING PLURALITY OR SEVERALTY OF OWNERSHIP OR RIGHT—PARTICULAR TERMS OF DOUBTFUL MEANING—GIFTS TO SEVERAL—AS A CLASS OR AS INDIVIDUALS.

Where a testator directs his estate to be converted and divided equally among certain nephews and nieces named, the legatees do not take as joint tenants and the gifts to those who died before the testator lapsed, and, in the absence of any other testamentary disposition, are distributable to the testator's next of kin.

Proceeding for an accounting.

Geller, Rolston & Horan, for executor; R. & E. J. O'Gorman, for residuary legatees; Lord, Day & Lord, for William F. and

Louisa A. Dugan, next of kin; Edward J. McGuire, for Gilbert F. Smith and others, next of kin; Strouse & Strauss, for Louis D. Smith, next of kin.

McCAULEY, S.—There are two or three questions presented for my consideration upon this accounting which affect the distribution of the testator's residuary estate.

The legacy of \$10,000 which the testator's by the fourth clause or paragraph of the will, bequeathed to Clara Smith, his niece, undoubtedly lapsed and fell into and now forms a part of the residuary estate, by reason of the legatee's death during the testator's lifetime. *Matter of Wells*, 113 N. Y. 396; *Matter of Barrett*, 132 App. Div. 134, and cases hereinafter cited.

The direction to the executors, as expressed in the eighth clause or paragraph of the will, "to sell the whole of my said estate, real and personal, either at public auction or private sale, and to give good and sufficient deed, or deeds, or other instruments of conveyance for the same; and to divide the net proceeds of such sale or sales among those persons entitled there-to under the provisions of this my will" amounts to an equitable conversion of the real estate into personalty. The language of this clause is explicit, and when read in connection with the residuary clause which immediately precedes it the meaning of the testator is plain. He intended that the real estate should be converted into personalty and the proceeds distributed as such to the residuary legatees. *McDonald v. O'Hara*, 144 N. Y. 566.

The residuary clause above referred to is in the following language, namely:

"Seventh: I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, of what nature or kind soever, and wheresoever situated, unto my following named nephews and nieces (children of my said brother Bartlett, and Mary A., his wife), and my grandnephew, the son of

my deceased nephew Bartlett Joseph Smith (who, also, was a son of my said deceased brother), namely, Thomas C. Smith, Mary Josephine Smith, Alicia Stuart, Henry L. Smith, Clara Smith, and Bartlett Joseph Smith, Junior, equally to be divided among them, their heirs and assigns forever. The issue of any of them dying and leaving issue, to take the share the parent would have taken if living."

Two of the residuary legatees, namely, Thomas C. Smith and Clara Smith, predeceased the testator and left no issue; and the question has, therefore, arisen as to what disposition shall be made of their shares. Counsel for the four surviving residuary legatees, namely, Mary Josephine Smith, Alicia Stuart, Henry L. Smith and Bartlett J. Smith, contends that the residuary legatees constitute a class and take as joint tenants; and therefore that no lapse occurred by reason of the death of the two residuary legatees above named, and that the survivors take the entire residuary estate. The next of kin of the testator, who have been cited and appear, insist that the bequest was to the residuary legatees, not as a class, but as tenants in common, each taking severally and individually; and therefore that upon the death of the two residuary legatees, without issue and during the testator's lifetime, their respective shares, not being otherwise disposed of under the will, lapsed and are distributable to the testator's next of kin; in other words, that the testator died intestate as to those shares.

The rule is well established that a legacy or devise, even with or without words of limitation lapses in case of the death of the legatee or devisee before the testator, in the absence of express words to prevent a lapse, or of something in the context of the will indicating a contrary intent, with the single statutory exception, in certain cases, of a legacy to a child or other descendant of the testator. This is, also, true where the gift is to several as tenants in common and not as a class. *Matter of Kimberly*, 150 N. Y. 90; *Matter of Wells*, 118 id. 396;

Roberts v. Bosworth, 107 App. Div. 513; *Matter of Whiting*, 33 Misc. Rep. 274.

Whether a bequest in a will is to a class or to the individuals as tenants in common must depend upon the language employed by the testator in making the gift. *Moffett v. Elmendorf*, 152 N. Y. 475. It will be noted that the residuary clause under consideration contains no words of survivorship; nor does it provide for any method of distribution in the event of the death of the legatees therein named or any of them, before the death of the testator, leaving no issue then surviving.

In my opinion the language used by the testator in making the gift is not susceptible of the interpretation put upon it by counsel for the surviving legatees, when read and construed alone, or in connection with the other provisions of the will. The number of persons was certain at the time of the gift, the share that each was to receive was, also certain, being one-sixth part of the residuary estate, and was in no way dependent for its amount upon the number who should survive. It is said that in legal contemplation a gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportion, the share of each being dependent for its amount upon the ultimate number. *Matter of Barrett*, 132 App. Div. 134. See, also, *Matter of Kimberly*, supra; *Langley v. Westchester Trust Co.*, 180 N. Y. 326; *Matter of Russell*, 168 id. 169.

These cases are decisive of the question under consideration. It follows from what has been said that the testator died intestate as to the shares of the two deceased residuary legatees, and that those shares are distributable to the next of kin of the testator. He left, as his next of kin, nine nephews and nieces, and the children and descendants of two deceased nephews.

The distribution must, therefore, be made under section 2782, subdivision 11, of the Code of Civil Procedure, which

was in force and effect at the time of the testator's death, and which is in the following words: "Where such descendants or next of kin are of unequal degree of kindred, the surplus shall be apportioned among those entitled thereto, according to their respective stocks; so that those who take in their own right shall receive equal shares and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled." See *Matter of Prote*, 54 Misc. Rep. 495; *affd.* 133 App. Div. 928.

The shares as to which the testator died intestate must, therefore, be divided into eleven equal parts, and so distributed that each of the next of kin will receive the following share of the whole, namely: To Gilbert F. Smith, Henrietta C. Clark and Edna S. Robinson, each one thirty-third; to Louisa Hughes, William F. Smith, Alicia Stuart, Henry L. Smith, Margaret A. Smith, Bartlett J. Smith, Mary J. Smith, Louis D. Smith and George D. Smith, or those claiming through or under him, each one-eleventh; to William F. Dugan and Louisa A. Dugan, each one-twenty-second.

Decreed accordingly.

Matter of the Probate of the Last Will and Testament of SARA A. McCARTY.

(Surrogate's Court, Kings County, June, 1910.)

SURROGATES' COURT—PROCEDURE AND REVIEW—HEARING, REHEARING AND DECISION—SUBMISSION OF REQUESTS BY PARTIES; SETTLEMENT OF FINDINGS.

A Surrogate's Court may make findings of fact or rule upon questions of law, pursuant to requests therefor upon the settlement of a case on appeal, at any time before the case in its final form is certified as settled by the judge's signature.

Proceeding upon the probate of a will.

John C. Judge, for motion; Everett Greene (Charles H. Beckett, of counsel), opposed.

KETCHAM, S.—It is provided that, in this court, "Either party may, upon the settlement of a case, request a finding upon any question of fact, or a ruling upon any question of law." Code Civ. Pro., § 2545.

The proposed case has been presented, with the amendments proposed thereto, and the amendments and the case have been marked according to the disposition intended by the court. Thereafter, the appellants request findings upon questions of fact and rulings upon questions of law. It is contended by the respondent that such requests cannot be considered.

(This argument can only prevail if it can properly be said that the case on appeal was settled before the requests were made. The mere disposition of amendments or the correction of the case upon its face is not the settlement. Strict practice, and this is a case for strictness, requires that the case in its final form shall be certified as settled by the judge's signature.

The requests have been passed upon.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of ADDISON E. KREIDLER, as Executor of the Last Will and Testament of EDWARD CRIDLER, Deceased.

(*Surrogate's Court, Steuben County, July, 1910.*)

SURROGATES' COURTS—PROCEDURE AND REVIEW—COSTS AND ALLOWANCES; POWER OF SURROGATE IN GENERAL; PARTIES ENTITLED TO COSTS; AMOUNT AND ITEMS; ALLOWANCES.

The power of a surrogate to grant allowances and costs on the judicial settlement of an executor's accounts is derived wholly from and limited by sections 2561 and 2562 of the Code of Civil Procedure.

Upon the judicial settlement of an executor's accounts, costs or allowances are granted to a party and not to his attorney or counsel.

No party has an absolute right to costs or allowances, and whether they should be awarded or granted is in the discretion of the surrogate subject to review by the Appellate Division.

An accounting party cannot be reimbursed for the services or expenses of an attorney or counsel in administering an estate prior to the commencement of the proceeding to account unless he has paid the bill of the attorney or counsel and charged it to the estate or it is credited to him in his account.

A legatee or devisee who was not an accounting party cannot be granted an allowance under section 2562 of the Code of Civil Procedure; the only allowance which can be given is by way of costs under section 2561, not exceeding the amount therein mentioned.

Where there is no contest the fees of counsel appearing for legatees are not a charge upon the funds of the estate but must be paid by the legatees.

Time spent in the preparation of pleadings and briefs, ascertaining the facts and appearing upon an adjournment or to settle the final decree is no part of the "trial" within the meaning of section 2561 of the Code of Civil Procedure.

No allowance can be made for days on which adjournments occur without an actual hearing.

Upon the judicial settlement of his accounts, an executor should show by affidavits or otherwise the nature, extent and amount of services of counsel and his disbursements; and it is the duty of the surrogate to ascertain the same before making any allowance or an award of costs and he may examine the accounting party and witnesses upon the question.

Where contestants do not completely fail to make good their objections to the accounts of an executor, and the contest is made in good faith and the will is obscure upon the questions in controversy and learned counsel may well disagree as to its meaning, no costs should be awarded against the contestants, personally, but the costs should be paid out of the estate.

Upon the judicial settlement of the accounts of an executor no allowance can be made for the services of counsel for contestants rendered in an action brought for the construction of the will or in a proceeding to compel the executor to account.

Where two attorneys are employed no more costs can be allowed than where there is one employed.

No allowance for counsel fees can be made to the successful party in excess of the amount allowed by law, though the result of such services was a saving to the estate.

Where it appears that a party to the judicial settlement of the accounts of an executor retained no counsel, an allowance may not be granted to an attorney who, in good faith, appeared for her, believing he was serving her in the proceeding.

Application for costs and allowances made by Addison E. Kreidler, executor, etc.; George Willey and Edward Willey, as executors, etc., of Philura Willey, deceased; Nelson Swink and Amanda Swink and Edna S. Kame, and Edward A. Kreidler and Sophia S. Kreidler.

Henry V. Pratt, for Addison E. Kreidler, executor, etc.; Charles W. Stevens and John F. Little, for George Willey and Edward Willey, as executors, etc., of Philura Willey, deceased; H. A. Burdick, for Nelson Swink, Amanda Swink and Edna S. Kame; W. S. McGreevey, for Edward A. Kreidler and Sophia S. Kreidler.

WHEELER, S.—There seems to be some confusion or misapprehension on the part of the bar in general on the subject of costs and allowances in the Surrogate's Court, and, in view of the fact that some of the parties to this proceeding have asked for allowances which the surrogate has no power to grant, we take this occasion to make a short review of the law governing costs and allowances in Surrogate's Court.

The surrogate has not the power to award costs or to grant an allowance for any amount that he may think would compensate a party. The power to grant allowances and costs is derived wholly from statutory provisions. *Matter of Welling*, 51 App. Div. 357; *McMahon v. Smith*, 20 Misc. Rep. 305; *Matter of Reeves*, 48 Hun, 607; Code Civ. Pro., §§ 2561, 2562.

It matters not how generous the surrogate might feel, how liberally he might wish to award costs or allowances to an accounting party, or costs to any other party; the above mentioned sections of the Code of Civil Procedure limit him, and he must keep within their provisions.

Many counsel and attorneys seem to think that costs and allowances are made to them or belong to them. This is a mis-

take. Costs or allowances are awarded or granted to a party, and not to his counsel or attorney. *Seaman v. Whitehead*, 78 N. Y. 306; *Matter of Welling*, 51 App. Div. 357; *Milliman Law of Costs*, p. 264, § 185, and citations thereunder.

This is on the principle that the party has employed an attorney or counsel to whom he is personally responsible, and the party's liability to his attorney or counsel is not measured by the allowance of the surrogate. It may well be more than the allowance. The claim of the counsel or attorney is against the party employing him, and he is entitled from such party to a fair compensation for his services, and for all his expenses and disbursements, paid or incurred under his retainer; and, whether the party obtains any costs or allowance, it matters not to the attorney, as a matter of law. It is only a question of how much the party can be reimbursed out of the estate or fund, or, where there has been a contest, out of the opposing party.

In a contest an attorney or counsel may have fairly earned \$1,000, and can hold his client liable therefor, but his client, the party, cannot be reimbursed any more than the sections of the Code above cited provide; and, where the party is not an accounting party, seventy dollars and ten dollars a day for the trial, where the trial lasts over two days, are all that the surrogate can allow the party toward reimbursing him on the bill which his counsel or attorney has against him for services.

Where the party is not an accounting party, the only costs or allowances which can be made by the surrogate in addition to disbursements, are twenty-five dollars, where there has not been a contest, and where there has been a contest seventy dollars plus ten dollars a day for each day of trial beyond two. It matters not how much is involved, how difficult the questions of law, how intricate the questions of fact, a party, who is not an accounting party, cannot be reimbursed out of an estate or fund, or out of an opposing party, more than said sums; but

that does not preclude his attorney or counsel from holding him liable for the fair and full value of his services.

But, where the party is an accounting party, such as an executor, administrator, guardian or testamentary trustee, then, in addition to the costs and disbursements above mentioned and which are authorized by section 2561 of the Code of Civil Procedure, an additional allowance may be made by the surrogate of not exceeding ten dollars for each day necessarily occupied upon such accounting by the accounting party in preparing his account for settlement and, in case of a contest, not exceeding ten dollars for each day occupied in the trial, and otherwise preparing for trial; and it must be borne in mind that this additional allowance applies only to an accounting party and to no other party to the proceeding. Code Civ. Pro., § 2562.

No party has an absolute right to any costs or allowance. Whether costs should be awarded or an allowance granted is in the discretion of the surrogate, subject, of course, to review by the Appellate Division; but, nevertheless, the question of costs and allowances is a matter of sound discretion to be exercised either by the surrogate or by the Appellate Division, which may review the surrogate's decision upon such subject.

Costs or an allowance may be made payable out of the estate or fund, as justice requires, or costs may be charged against an opposing party.

The above rules are laid down by sections 2557 and 2561 of the Code of Civil Procedure.

An accounting party who makes a claim for the services of his counsel or attorney in the course of administering an estate, up to the time of beginning a proceeding for the settlement of his account, should pay his counsel for such services and credit himself in his account therefor, so that the account may be examined and challenged by all parties in interest, and examined also by the surrogate. *Osborn v. McAlpine*, 4 Redf. 6; *Shields*

v. Sullivan, 3 Dem. 296; Matter of Bailey, 47 Hun, 477; Walton v. Howard, 1 Dem. 103; Gilman v. Gilman, 6 T. & C. 214.

It should be distinctly understood that an accounting party cannot be reimbursed for the services or expenses of an attorney or counsel rendered, at his request, in administering an estate prior to the commencement of the accounting proceedings, unless he, as an accounting party, has paid the bill of the counsel or attorney, and unless the same is charged to the estate or credited to him in his account. It has been the practice of many attorneys to wait until the judicial settlement of the account of the accounting party, and then apply to the surrogate, not only for an allowance for services and expenses of counsel in the proceeding for the judicial settlement of the account of the accounting party, but also for services and disbursements of counsel or attorney beginning ever with the probate of the will, or the proceedings for granting letters of administration, and extending throughout the administration of the estate. This is all wrong, and the practice should cease. The surrogate has no right or business to allow any sum to reimburse the accounting party for services and expenses of an attorney or counsel prior to the commencement of the proceeding for the judicial settlement of his account, unless the same appears in his account and, furthermore, unless the same has actually been paid; and, where an accounting party has not paid his counsel or attorney, he is not entitled to any reimbursement, even though payment by note of the accounting party, indorsed by a third party, is claimed. Matter of Blair, 28 Misc. Rep. 607; Matter of Bailey, 47 Hun, 477; Shields v. Sullivan, 3 Dem. 296.

The costs or allowances upon an accounting have no place whatever in the account of an accounting party, as they must first be fixed and allowed by the decree of the surrogate. Harwood v. Hewlett, 5 Redf. 339; Carroll v. Hughes, id. 337; Burtis v. Dodge, 1 Barb. Ch. 91; Code Civ. Pro., §§ 2561, 2562.

Let us emphasize the rule that the claim of an accounting party for reimbursement for services and expenses of counsel during the administration of an estate, up to the time of the commencement of the proceeding for the judicial settlement of his account, should appear in the account, and that the claim for such services, etc., rendered in the proceeding for the judicial settlement of his account, should not appear in the account, but must be fixed and allowed like the commissions of an accounting party, by the surrogate, at the close of the proceeding for such judicial settlement.

Often next of kin or legatees ask for an allowance, but in no instance can an allowance be granted to a legatee or devisee who is not an accounting party, under section 2562 of the Code of Civil Procedure; and the only allowance which can be given them is by way of costs under section 2561 of the Code of Civil Procedure, and such an allowance cannot exceed the amount therein mentioned, to wit: Where there is a contest seventy dollars and ten dollars for each day occupied in the trial, where the trial lasts more than two days; and, where there is not a contest, the fees of counsel must be paid by their clients, and not in whole or part made a charge upon the funds of the estate. *Matter of Welling*, 51 App. Div. 359.

The time spent in preparing pleadings, making briefs, ascertaining facts, appearing upon an adjournment, or appearing to settle the decree, is no part of the trial within the meaning of the Code of Civil Procedure. *DuBois v. Brown*, 1 Dem. 317; *Matter of Niles*, 5 Redf. 110.

No allowance can be made for days on which adjournments occur without an actual hearing. *Matter of Clark*, 36 Hun, 301.

No allowance can be made to legatees where they were not the successful parties upon an accounting, either in surcharging the account, or having some item disallowed. *Matter of Welling*, 51 App. Div. 355.

The accounting party should show in his proceeding for the judicial settlement of his account, by affidavits or otherwise, the nature, extent and amount of services of counsel and his disbursements; and it is the duty of the surrogate to ascertain the same before making an allowance, or an award of costs, and the surrogate can examine the accounting party and witnesses upon the question. *Matter of Reeves*, 48 Hun, 606.

And bearing upon the power and duty of the surrogate upon such subject, counsel are asked to read Surrogate Ransom's address to the bar of New York city, reported in 1 Connolly, 563 and 564.

Having in mind the rules, as found in the foregoing authorities, we will now take up the applications of the parties for costs and allowances:

Mr. Pratt files two affidavits showing the nature, extent and value of the services rendered and the disbursements and expenses of Addison E. Kreidler and of himself. Such affidavits, which have not been disputed by any party, show that Mr. Pratt, at the executor's request, was actually occupied seven days in preparing the account and one day in preparing the supplemental account for settlement, making a total of eight days so occupied. This fact not being disputed the surrogate allows the executor eighty dollars therefor, pursuant to the power given him by section 2562 of the Code of Civil Procedure.

Mr. Pratt's affidavit also shows that there were objections filed to the first account of the executor by Mr. and Mrs. Swink and Mrs. Kame through their counsel, Stevens & Stevens. Those objections were never tried before the surrogate, but the executor and his counsel and the contestants and their counsel spent several days in going over the account and adjusting the same, the result of which was that, out of 76 items objected to, amounting to \$660, 44 of them were allowed to stand, and all the others except 9 were allowed, and those 9 which were not allowed amounted to \$64.99; and that the net result of the con-

test was the surcharging of the executor's account to the amount of \$109.58, which included \$25 for lumber which was not one of the items objected to, or with which the contestants asked to have the account charged.

Under section 2561 of the Code, there having been a contest, the surrogate allows to the executor seventy dollars costs, the same to be paid out of the estate and not charged against the contestants personally. Had the contestants completely failed to have made good their objections, the surrogate would be inclined to award these costs against them.

In this proceeding, objections were made by Edward A. Kreidler and Sophia S. Kreidler, which made a contest fairly within the meaning of the law; and, under section 2561 of the Code, the surrogate allows to the executor seventy dollars upon such contest, the same to be paid out of the estate and not awarded against the contestants. The reason we do not award these costs against the contestants is that the will of the testator upon the question in controversy was drawn obscurely, and learned counsel might well disagree as to its meaning and how the same should be construed; that we are satisfied that the contest of Mr. and Mrs. Edward A. Kreidler was made in good faith and in the belief that they were right in their contention; and, in view of the fact that the testator made a will so uncertain in its meaning, it is but fair that the estate should be charged with all of the expenses of the successful parties which have been made in construing the said provisions of said will, in so far as the surrogate has the power to charge the same against the estate.

Mr. Pratt's affidavit shows that the individual expenses and disbursements of the executor in this proceeding are \$17.52, and those of Mr. Pratt, \$16.40, and that the executor paid Stevens & Stevens costs and disbursements in the proceeding to compel an accounting \$21. The last mentioned item should have appeared in the supplemental account of the executor, but

we allow the same here, together with the other items of expenses and disbursements, thus allowing to Addison E. Kreidler a total of \$274.92 to be paid out of the said estate, \$236.40 of which may be paid directly to his attorney H. V. Pratt and \$38.52 retained by Mr. Kreidler.

Mr. Charles W. Stevens files an affidavit showing the nature, extent, etc., of the services rendered by his firm for Mr. and Mrs. Swink and Mrs. Kame to a certain date, and also the nature, extent, etc., of his and Mr. Little's services rendered for the executors of Philura Willey, deceased. First, he claims for his clients Mr. and Mrs. Swink and Mrs. Kame, for services rendered in proceedings to compel the executor to render his account. This proceeding was terminated by an order allowing twenty-one dollars for the costs and disbursements of that proceeding, which have been paid, so so much of said claim is disallowed. A claim is also made in behalf of Mr. and Mrs. Swink and Mrs. Kame for services rendered upon the objections filed by them to the account of the executor and also for services rendered for them in opposing the claim of Addison E. Kreidler, individually, against the estate. It appears that the objections to the account resulted in but a slight increase to the estate, and that the opposition to the claim of Mr. Kreidler against the estate was unsuccessful. Mr. Pratt, in behalf of his client, Mr. Kreidler, asks for costs against these parties who opposed his client's claim, but we have decided not to award costs in favor of Addison E. Kreidler against Mr. and Mrs. Swink and Mrs. Kame growing out of the contest upon the claim, and also not to allow any costs in favor of Mr. and Mrs. Swink and Mrs. Kame upon the objections to the account of the executor.

Mr. Stevens' affidavit also shows that services were rendered in an action in the Supreme Court brought to construe the will of the testator, etc. Such services cannot be allowed against the estate. They are not for any services which were rendered

in this proceeding, and such claim is disallowed. Stevens & Stevens must look to their clients, Mr. and Mrs. Swink and Mrs. Kame, for all services and disbursements rendered and paid upon the contest of the executor's account, in opposition to the executor's individual claim against the estate, and in the action in the Supreme Court to construe the will, and also all services rendered in behalf of them before this proceeding was begun and which were not rendered in this proceeding.

Mr. Stevens' affidavit shows that his firm rendered legal services in behalf of the executors of Philura Willey, deceased, in opposition to the contentions of the Swinks and Mr. and Mrs. E. A. Kreidler, and upon the objections interposed by Mr. and Mrs. Kreidler there certainly arose a contest in this proceeding, the trial of which occupied three days; and, under section 2561 of the Code, George Willey and Edward Willey, as executors, etc., are allowed costs, payable out of the estate, seventy dollars for the contest and ten dollars for the extra day of trial, a total of eighty dollars; and the decree made herein may provide that the same be paid directly to their attorneys, Stevens & Stevens.

The authorities previously cited show that the time engaged in consultation and preparing briefs cannot be included in this bill of costs. Seventy dollars and the time actually occupied in the trial beyond two days' trial are all that can be allowed besides disbursements.

No more costs can be allowed where two attorneys are employed than where one is employed. Milliman Law of Costs, p. 272, § 191.

This does not preclude Messrs. Stevens and Little from recovering their pay. They can recover of their clients the full value of all services which they have rendered in their behalf in this proceeding and in and about said estate not done in this proceeding. This decision simply means that their clients cannot be reimbursed to any amount more than the eighty dollars allowed.

Mr. Stevens' affidavit makes a claim for numerous days in court, including adjournments when no evidence was taken, etc. For all these extra days and the extra time Stevens & Stevens and Mr. Little must look to their clients for their pay.

Undoubtedly their services have been in a way quite valuable in bringing about a settlement, and perhaps have resulted in a saving to the estate, but that does not give the court any right to reimburse their clients beyond the amount allowed by law.

It is the experience of every attorney in other courts of record, that the bill of costs allowed to the winning party is very often inadequate to compensate the party for attorney's and counsel's services and other expenses. But that is a fault of the law, if it be a fault at all, and not of the court.

Mr. Burdick files an affidavit showing the extent, nature, etc., of his services in behalf of Mr. and Mrs. Swink and Mrs. Kame, but it appears that Mrs. Kame has not employed him in this proceeding. Her affidavit was presented to that effect. We believe that Mr. Burdick appeared in good faith for her and believed that he was serving her in this proceeding. However, inasmuch as allowances are made to a party to reimburse him or her for services of counsel, etc., and it appearing that she has not retained any counsel in this proceeding, therefore she is not reimbursed and no costs are allowed to her.

Mr. and Mrs. Swink asked for a construction of the will which was not granted. In other words, that for which Mr. Burdick contended, as their counsel, was not allowed, and to that extent Mr. and Mrs. Swink were not successful in the contest over the terms of the will and no costs are allowed to them. Mr. Burdick must look to Mr. and Mrs. Swink for all his services and disbursements in this proceeding.

No costs are allowed against Mr. and Mrs. Swink, as contestants, for the reason above given for not allowing costs against Mr. and Mrs. Kreidler.

Mr. and Mrs. Edward A. Kreidler filed no affidavit as to any.

services or disbursements, although Mr. McGreevey, in their behalf, orally made an application for costs or an allowance.

Inasmuch as they were unsuccessful in their contest under the objections filed, no costs are awarded to them; and, for the reasons hereinbefore given, no costs are awarded against them. Mr. McGreevey must look to them for his services and disbursements.

To summarize: Costs and allowances are awarded and granted to Addison E. Kreidler in the amount of \$274.92.

To George Willey and Edward Willey, as executors, etc., eighty dollars, the same to be paid as hereinbefore indicated.

Decreed accordingly.

Matter of the Estate of HENRY N. HALL, Deceased.

(*Surrogate's Court, Cattaraugus County, August, 1910.*)

WILLS—DISPOSAL BY WILL—MISTAKE, FRAUD AND UNDUE INFLUENCE, ETC.—

GENERAL RULES—UNDUE INFLUENCE—APPEALS AND PERSUASIONS.

Where a testator, after having made a will giving his wife the use of his estate, which consisted of the house and lot in which they resided, for life, with remainder to a son by a former wife, a man in middle life and able to provide for himself, on the same day, after a long interview between the husband and wife in the office of the attorney who drew the will and as the result of the tearful argument and persuasion of the wife who was enfeebled in health and advanced in years, made a new will giving his estate to her absolutely, it cannot be inferred from the circumstances of the transaction that the testator was subjected to undue influence in the making of the latter will.

Proceedings upon contested probate.

M. V. Benson and G. W. Cole, for proponent; Crowley & Conley, for contestant.

DAVIE, S.—Upon the return of the citation issued for the probate of the will of the decedent, Harry Hall, his son, filed objections alleging lack of testamentary capacity on decedent's part at the time of the execution of the will and that the execution of the same was procured by undue influence.

Decedent died on the 28th day of March, 1910, leaving him surviving one son, his only heir at law and next of kin, who is the contestant, and his widow who was a second wife and not the mother of Harry Hall. The will bears date on the 27th day of August, 1907, and names the widow as the sole legatee and devisee and executrix. The only estate possessed by the decedent at the time of his decease was a house and lot, where he resided, in the village of East Randolph, of the value of \$1,200.

At the time of and for several years preceding decedent's death, his family consisted of himself and wife; the son Harry was engaged in business for himself, but occasionally visited his father. No enmity or ill-will on the part of decedent toward his son is disclosed by the evidence. Decedent was somewhat advanced in years, to some extent physically debilitated, but possessing fair business intelligence; the widow had formerly resided in the family of decedent's father, doing work as a domestic, and finally married decedent with whom she resided for many years, so far as the testimony discloses, in harmony and without serious discord or disagreement. In the forenoon of the 27th of August, 1907, the same day upon which this will was executed, decedent and his son went to the law office of Goodwill & Benson in East Randolph and decedent stated to one of the attorneys that he desired to have his will prepared; that he wished to give his wife the use of all his property during her lifetime and, upon her death, to the son. A will was thereupon prepared in accordance with decedent's instruction, signed by him and published and declared by him as his last will and in all respects fully executed in accordance with the statute. It does not appear that the son took any part in the

transaction relating to the execution of the will, or made any suggestion as to any of its provisions. A copy of the will was prepared and delivered to the son, and thereupon decedent and the son left the office together. In the afternoon of the same day, decedent and his wife again went to the same attorney's office and the details of what then occurred are fully described by the attesting witness Carpenter. He says: "He and his wife came in after dinner; in the forenoon he and his son had come to the office and stated to Mr. Benson that he wanted to make his will and the will was made under his direction by Mr. Benson, and executed, and I was one of the witnesses to that will. I don't think three hours after that he came to the office again. That was the occasion in the afternoon when this will was executed, and his wife was with him; and, as I remember it, Mrs. Hall was crying when they came in the office; and, as I remember it, there was quite a conversation between Mrs. Hall, Mr. Goodwill and Mr. Hall. The substance of the conversation was: Mrs. Hall was talking with Mr. Hall endeavoring to get him to make another will; Mr. Hall said he had already made a will and she says, 'Yes but you don't give me in that will what you had ought to give me;' and I know in all this conversation directed to Mr. Hall it would be quite a while before he would answer and would have to have the question put to him two or three times; and I remember of her saying she couldn't take care of him and have the property go to some one else; and I remember of his saying to her that he had provided for her in the will he had drawn in the morning; and I remember of her saying 'it was just for as long as I lived;' she asked him if he didn't want to do it and she asked him again; and I think during the greater part of the conversation she was crying, and she appeared very nervous; and I remember of Mr. Goodwill asking if he wanted to give it to her absolutely, and of his saying he had made his will, and of her saying to him she couldn't take care of him and not get anything

for it. Q. What was done with the former will? A. It was burned. Q. Who burned it? A. Mr. Goodwill. Q. At whose direction? A. At the direction of Mr. Hall. They were in the office an hour and a half before the will was made, and I remember they had to put a good many questions to him to get him to direct Mr. Goodwill to destroy the will. Mr. Goodwill asked him a good many times if that was his request; and finally he directed Mr. Goodwill to destroy it and Mr. Goodwill burned it there in the presence of all of us."

After the will in question was prepared, it was read over to the decedent, signed by him, duly declared and published by the decedent as his last will and testament and thereupon signed by the attesting witnesses in the presence and at the request of the decedent.

It appears from the evidence presented on behalf of the contestant that the widow was unfriendly to him, and that she had asserted that she hated him, and that he should not have any of the property. The only testimony offered by the proponent was that of the attesting witnesses, showing a strict compliance with the statutory requirements in the execution of the will in question, and proof of the further significant fact that, on the 25th day of February, 1906, the decedent had duly executed a will containing precisely the same testamentary provisions as the will propounded, that is, all of decedent's estate was given absolutely to the widow and she was named as the executrix thereof.

The evidence fails to establish the allegation of want of testamentary capacity on the part of decedent at the time of the execution of the two wills on the 27th day of August, 1907. While not vigorous, physically or mentally, he possessed sufficient mentality and understanding to distinctly recall and comprehend the nature and extent of his estate and the relative equities of those who were natural objects of his testamentary

bounty. That is all that the law exacts as an indispensable qualification in testamentary transactions.

The more important consideration relates to the allegation of undue influence. It is urged on the part of the contestant that the destruction of the first will and the execution of the second, on the day named, working a somewhat radical change in the testamentary disposition of decedent's estate and entirely disinheriting the son, were the result of dominating importunity on the part of the widow amounting to undue influence within the legal significance of that term. The subject of *undue influence* has so frequently received careful consideration in testamentary jurisprudence that no serious difficulty is encountered in discovering the true rule as an abstract proposition; the difficulty arises when we attempt to apply such rule to the facts and circumstances of some particular case.

Undue influence has been defined as "That which compels the testator to do that which is against his will, from fear, a desire of peace, or some feeling which he is unable to resist." Schouler Wills (2d ed.), par. 22.

Influence which exists from attachment, affection, or a desire to gratify, or which results from argument and appeals to the reason and judgment of the testator, is not *undue* nor sufficient to invalidate a will. 27 Am. & Eng. Encyc. of Law, 453.

Undue influence consists in exerting upon the testator such an improper influence, whether fraudulent, threatening or otherwise coercive, as to effect a change in the testator's testamentary disposition, so that the will made is not the will he would have made if uninfluenced. *Matter of Martin*, 98 N. Y. 193; *Matter of Vedder*, 14 N. Y. St. Repr. 470; *Matter of Bolles*, 37 Misc. Rep. 562, 568.

Undue influence will not be presumed, but the party asserting it assumes the burden of proving its existence. *Dobie v. Armstrong*, 160 N. Y. 584; *Matter of Nelson*, 97 App. Div. 212; *Matter of Mondorf*, 110 N. Y. 450.

If there are testamentary capacity and knowledge on the part of the testator of the contents of the will and the testamentary requirements of the statute are complied with in its execution, it can be avoided only by proof of influence amounting to force or coercion; and the burden is upon the party making the allegation of showing that testator was imposed upon or overcome by the act or practices of the beneficiary. *Matter of Martin*, *supra*; *Matter of Mabie*, 5 Misc. Rep. 179, 183; *Loder v. Whelpley*, 111 N. Y. 239; *Matter of Williams*, 19 N. Y. Supp. 778.

In the case of absence of direct proof, the charge of undue influence must be established by such an array of circumstances as to make the inference of its exercise irresistible; the contestant must show facts utterly inconsistent with the hypothesis of the execution of the will by any other means than undue influence. *Gardiner v. Gardiner*, 34 N. Y. 155; *Loder v. Whelpley*, *supra*; *Marx v. McGlynn*, 88 N. Y. 357; *Matter of Murphy*, 41 App. Div. 153; *Matter of Snelling*, 136 N. Y. 515; *Matter of Liddy's Will*, 5 N. Y. Supp. 639.

In view of the fact that the testator's property was comparatively small in amount, consisting merely of the dwelling and lot where he resided, that the son was a man of middle age and entirely competent to care for himself, and that the widow was somewhat enfeebled in health and of advanced years and, as it appears, hardly in a situation to be thrown upon her own resources for support and maintenance, it is not remarkable that she should have regarded the provisions made for her in the will executed in the forenoon as entirely inadequate and insufficient. Nor is it at all unnatural that the testator should have desired to remember his son, to some extent, in the ultimate distribution of the estate; but it seems, that, as early as 1906, testator had determined that, under all the circumstances, there was no more than sufficient of his estate to provide for his wife in her old age and he had accordingly executed his will giving everything

to her. Just what line of reasoning led him to attempt some different testamentary disposition giving the son the greater interest therein is not disclosed. There can be no doubt but that at the time of the execution of the first will, on the 27th day of August, 1910, testator desired and was of the opinion that he ought to provide for the son as well as his wife; nor can there be any doubt but that he was led to make the will now presented at the earnest solicitation of the wife, or that she reasoned with him regarding the insufficiency of the provision made for her in the first will of that date. Undoubtedly he was influenced to some extent by her assertion that she could not take care of him if the property was to go to some one else, and it was with a considerable degree of reluctance that he finally consented to make the change desired by her and to have the former will destroyed; but it is apparent that he did consent; that the will now presented was prepared and read to him, or that he fully comprehended its contents, or that he voluntarily signed the same, declared it to be his last will and requested the attesting witnesses to sign as such. While it is unfortunate that the widow found it necessary to interfere to any extent to protect what she honestly believed to be her rights, yet there was nothing in her conduct amounting to undue influence within the meaning of the term as established by the cases cited.

A decree will be entered herein dismissing the objections filed and admitting the will to probate.

Decreed accordingly.

In the Matter of the Transfer Tax upon the Estate of JENNIE
E. WHITNEY, Late of Stamford, Deceased.

(Surrogate's Court, Delaware County, September, 1910.)

WILLS—INTERPRETATION AND CONSTRUCTION—TERMS DEFINING QUANTUM
OR PURATION OF ESTATES OR INTERESTS—RULES AND IMPLICATIONS—
SUBSEQUENT CLAUSES REDUCING FEE.

Under a will by which the testator provides: "I give, devise and bequeath all my property, real and personal and wheresoever situated to my wife (naming her) and after her death the same shall go to my daughter (naming her)", the testator will be deemed to have intended his wife to have a life estate only, with remainder to his daughter; and upon the wife's death the daughter takes under her father's will, and there is no taxable transfer to her from her mother.

This is an appeal from an assessment of the estate of Jennie E. Whitney, late of Stamford, deceased, made by the county treasurer of Delaware county. In assessing the estate the county treasurer found as follows: "I do further report that the New York State Comptroller asks to have included in this estate the net amount of the real and personal estate of William Whitney, deceased, namely, \$18,424.42, claiming that, under the will of William Whitney, deceased, this decedent (Jennie E. Whitney) took absolute title to his entire estate. On the contrary, the attorney for Winifred B. Whitney, sole heir of Jennie E. Whitney, contends that the said will to Mrs. Whitney conveyed a life estate only, and that the estate of William Whitney descended to his daughter Winifred direct by the terms of his will and not through the mother's estate. I am of the opinion that the latter construction is correct and have not included same in my report."

The report of the county treasurer was confirmed by the surrogate and an appeal was thereafter taken by the Comptroller.

Barna Johnson, for Comptroller; Hugh Govern, Jr., for respondent.

GRANT, S.—William Whitney, a resident of Delaware county, died February 29, 1908, leaving a last will and testament which provided, among other things: "I give, devise and bequeath all my property, real and personal, and wheresoever situated to my wife Jennie E. Whitney and after her death the same shall go to my daughter Winifred B. Whitney."

His widow, a resident of Delaware county, died December 29, 1908, intestate, leaving her surviving a daughter and only child, Winifred B. Whitney, now Winifred B. Govern.

The estate of William Whitney upon his death was appraised and the transfer tax imposed by law paid.

Upon the death of the widow, proceedings were instituted to appraise her estate for the purposes of the transfer tax, upon the theory she took an absolute fee to all of her husband's estate, real and personal, under the provisions of his will, and that her personal estate, amounting to the sum of \$7,451.57, should be augmented by the amount of her husband's estate, amounting to the sum of \$18,424.42, making a total of \$25,875.99 subject to a transfer tax.

The claim of the daughter is that her mother, Jennie E. Whitney, only took a life estate under the will of William Whitney with remainder over to her; that the tax has once been paid upon her father's estate and the mother's estate is not sufficient to be subject to a tax; hence, no tax is due at this time.

The precise and only question for determination upon this appeal is whether the widow of William Whitney, under the provisions of his will, took an absolute fee in both his real and personal estate, or whether she only took a life estate with remainder over to the daughter.

The rule that, in cases where the first taker is given the absolute power of disposition of both the real and personal estate, the first taker takes a fee, as established in *Johnson v. Bull*, 10 Johns. 19; *Van Horn v. Campbell*, 100 N. Y. 287, and other cases, has been limited or qualified by a line of cases that hold

that, where the power of disposition is not absolute, so as to bring it within the rule, the first taker takes a life estate only. *Terry v. Wiggins*, 47 N. Y. 512; *Smith v. Van Ostrand*, 64 id. 278; *Wager v. Wager*, 89 id. 164; *Matter of Cager*, 111 id. 343; *Crozier v. Bray*, 120 id. 366; *Rose v. Hatch*, 125 id. 427; *Leggett v. Firth*, 132 id. 7; *Matter of McClure*, 136 id. 238.

In *Terry v. Wiggins*, *supra*, after a devise in fee of certain property, the will contained a devise of other real estate to the same devisee for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same, in part or the whole, if she should require it or deem it expedient; and upon her death the remainder was devised over to a religious society. It was held that, as to the second devise, the wife took a life estate only.

In *Smith v. Van Ostrand*, *supra*, Rapallo, J., in writing the opinion, says: "These cases sustain the proposition, that where an absolute power of disposal is given to the first legatee a remainder over is void for repugnancy. In *Patterson v. Ellis*, the language of the will was this, that the fund should be at the 'free and absolute disposal of his daughter after she should attain the age of twenty-one.' In the other cases cited the remainders were held valid, but they recognize the proposition, that if the power of disposition of the first taker is absolute, the remainder is repugnant. But they also recognize the principle, that if the *jus disponendi* is conditional the remainder is not repugnant. (*Hill v. Hill*, 4 Barb. 419). The power of disposition, if any, in the present case, was only for a special purpose, viz., the support of the widow. If not required for that purpose, there was no power to appropriate the funds to any other.

"The case of *Upwell v. Haley* (1 Peere Williams, 651) is precisely in point upon this question. There the testator bequeathed to his sister such part of his estate as his wife should leave of her substance. The court say: 'It is now established that a personal thing or money may be devised to one for life,

remainder over; and as to what has been insisted on, that the wife had a power over the capital or principal sum, that is true, provided it had been necessary for her subsistence, not otherwise.' The remainder over was held good."

In this case there is grave doubt whether the widow had any power over the capital or principal sum, so far as disposing of the same is concerned. No express power of disposition is given. The most liberal construction that can be given the will is that the testator intended his wife to have a life use with the power of using as much of the principal as might be necessary for her support and maintenance; and, if given such construction, the remainder over to the daughter would not be repugnant and would, therefore, be void.

In *Leggett v. Firth*, supra, the will of F., after making certain specific provisions for his children, contained the provision: "I give, also devise and bequeath to my wife Ellesheba all the rest and residue of my real estate; but on her decease the remainder thereof, if any, I give and devise to my said children or their respective heirs to be divided in equal shares between them." It was held the wife took a life estate only.

In *Matter of McClure*, supra, the will of McClure, which was drawn by himself, gave to his wife all his real and personal estate, to have and hold with full power to collect rents and income, to keep in repair, pay taxes and insurance, with full power to sell such real estate with the consent of his executors, as she thought best for the estate; should she remarry again, then she had her right of dower only in the estate. He also gave her discretionary power to give such sums of money to any, as she might think prudent, of his relatives. Upon the final accounting, several children and grandchildren were living. It was held the widow took under the will only an estate for life, and as to the remainder the testator died intestate.

It is true the rule which favors the vesting of estates is well established; and the rule, in cases where a will admits of two

constructions, the one which would disinherit children or lineal descendants and the other which would not the latter should be preferred, is also well established.

An intention to disinherit an heir, even a lineal descendant, when expressed in plain and unambiguous language, must be carried out; but it will not be imputed to a testator by implication, nor where he uses language capable of a construction which will not so operate. *Low v. Harmony*, 72 N. Y. 414; *Matter of Brown Estate*, 93 id. 295.

From the language employed by the testator in his will it is apparent he intended his wife to have a life estate only in his estate, with remainder over to his daughter; hence, the daughter takes under her father's will and not through the mother; and, as this estate has once paid the tax required by law, it is not subject to a second tax. The mother's estate without being increased by the father's estate is not sufficient to be subject to a transfer tax.

For the foregoing reasons the appraisal of the country treasurer is affirmed.

Appraisal affirmed.

Matter of the Estate of MARENA PARKER, Deceased.

(*Surrogate's Court, Cattaraugus County, September, 1910.*)

EXECUTORS AND ADMINISTRATORS—DEBTS AND LIABILITIES OF THE ESTATE—
EXHIBITION, ESTABLISHMENT, ALLOWANCE AND ENFORCEMENT OF CLAIMS
—EVIDENCE—CLAIMS BY RELATIVES AND PERSONS IN CONFIDENTIAL
RELATIONS.

Where a daughter, having a residence of her own and being engaged in the practice of medicine, upon the happening of an accident to her mother (who did not live with her but, though possessed of sufficient means to care for herself and pay any reasonable expenses incurred for that purpose, was supported by the contributions of said daughter and her sister), went to her mother's residence and rendered her surgical assistance and afterwards took her home with her, where she

remained for several months, receiving such medical attention from the daughter as she required; and where, later, the mother again went to the daughter's residence, to visit, and was taken there with her last illness, during which, for five weeks before her death, the daughter, with the help of a nurse, gave her constant care, attention and nursing, the circumstances are not such as to raise a presumption that the daughter's services were intended to be rendered gratuitously, in the absence of any express agreement relating thereto.

Proceedings for the judicial settlement of an administrator's account.

Jared D. Phillips, administrator in person; Charles E. Congdon, for Salina P. Colgrove, creditor and next of kin; Dana L. Jewell, for Creighton S. Andrews, receiver of the property of Esther B. Sheridan.

DAVIE, S.—No controversy exists regarding the account filed by the administrator for judicial settlement. A claim, however, against the estate, amounting, as filed, to the sum of \$921, was presented by Mrs. Colgrove, a daughter of decedent. Certain items of such claim were allowed and paid by the administrator; the legality of various other items was doubted. Consequently, a stipulation was filed, pursuant to the statute, providing for the determination of such items on judicial settlement. The validity of such items is contested by Mr. Andrews, who, through the instrumentality of a receivership, has succeeded to the interest of Mrs. Sheridan, a daughter of decedent, in the estate.

Among the controverted items is one of fifty-six dollars for clothing furnished by the claimant to decedent. While the evidence quite clearly shows that various articles of wearing apparel were provided by the claimant for the decedent, yet the amount and value thereof are left entirely problematical and altogether too vague to support a finding of liability against the estate. Moreover, the evidence tends to show that such articles were furnished as gifts, rather than under any express or im-

plied agreement on decedent's part to pay for the same. That portion of the claim, therefore, cannot be allowed.

Decedent was a widow, her husband having died in 1907, leaving no estate. The only property owned by the decedent at the time of her decease consisted of a house and lot in the village of Allegany, which has been sold by the administrator in proceedings for the disposition of real estate for payment of debts. The portion of the proceeds of such sale remaining for distribution, subject to commissions and expenses of this accounting, is the sum of \$524.

It appears, inferentially at least, that, several years prior to the father's death, the two daughters undertook to provide in equal shares such funds as might be required for the support and maintenance of their parents, they having no income whatever. Under such agreement, claimant furnished ten dollars and forty-five cents more than did her sister. After the father's death, the claimant furnished for the mother's support the sum of ninety-three dollars, the sister not then contributing. The decedent kept, in her own handwriting, a memorandum-book in which she gave each of the daughters credit for the various amounts advanced by them, respectively.

During the entire period covered by the claim, the claimant resided in the village of Salamanca, was a physician and somewhat actively engaged in the practice of her profession. In the fall of 1907, the decedent met with an accident, resulting in the fracture of one of her arms; claimant was immediately notified and went to the decedent's residence, assisted to some extent in the operation for reducing the fracture, remained several days caring for the decedent and then removing her to claimant's home in Salamanca, where she remained until the following February. During that period, claimant gave decedent's injury such medical attention as was required, dressing and bathing the broken arm as frequently as necessary. In the month of October of the same year, decedent went to the home of the

claimant for the purpose of making a visit and while there was taken seriously ill, from which sickness she did not recover. She died at the residence of the claimant March 11, 1909. For a period of five weeks before her death, decedent was in such a condition as to require constant care, attention and nursing. Claimant, assisted by a nurse, cared for the decedent, practically giving up, for the time being her practice and devoting substantially her entire time to the decedent. The fact of the rendition of the services, their arduous character and necessity, as well as their fair and reasonable value, are not the subject of serious controversy; but it is contended, on behalf of the contestant, that, in consequence of the relationship existing between the decedent and the claimant, the presumption prevails that such services were rendered gratuitously and for that reason claimant is not entitled to recover.

The principle which precludes a recovery for services rendered and benefits conferred between members of the same family has no application to the facts in this case. Decedent possessed sufficient means to care for herself and to pay any reasonable expense incurred for that purpose. Claimant did not reside with the decedent but, as already stated, was engaged in the practice of her profession in another locality. When decedent became incapacitated, first from the inquiry and later by her final illness, claimant removed her to her own home in Salamanca, treated and cared for her professionally, rendering services for her, not only laborious in their character but of the greatest importance and value to the decedent, foregoing to a large extent her professional employment, giving her time and skill to the care of her mother in the capacity of nurse and physician. No such condition of reciprocity or mutuality of benefits existed in this case as is contemplated by rule invoked in opposition to a recovery for the value of these services. The presumption of gratuitous services is not based so much upon the mere incident of kinship as upon the fact of reciprocal bene-

fits and advantages springing from the actual and practical relation between the parties. While this case is destitute of proof of any express agreement for compensation between the parties, the circumstances are entirely sufficient to bring the case directly within the operation of the well-recognized presumption that the rendition of meritorious services by one for the benefit of another is sufficient from which to imply an agreement on the part of the beneficiary to make fair and reasonable compensation. It will be observed that the rule promulgated in *Williams v. Hutchinson*, 3 N. Y. 312, has been materially modified by the determination in *Moore v. Moore*, 3 Abb. Ct. App. Dec. 303. The rule, as defined in the case last cited and which seems now to be generally followed, is: "Ordinarily from the fact of the rendition and acceptance of services, beneficial in their nature, the law will imply a promise to pay what the services are reasonably worth; *this presumption may not be repelled wholly by the fact that the service is rendered to a parent by a son of full age* but the legal presumption of an obligation to pay is *less strong* when the relation of parent and child exists than in the case of dealings between persons not bound to each other. *If to the relationship be added other circumstances tending to show as a matter of fact that the services were gratuitously rendered without any expectation at the time on either side that payment was to be made, the law will not imply a contract for compensation.*"

The distinction between the two cases cited is marked and important. Under the rule established by the former case, proof of the fact of the family relationship gave rise to the presumption of gratuitous services, and such presumption constituted a defense to a claim for services rendered between persons so circumstanced; and the burden of overcoming such presumption was placed upon the claimant. Accordingly, under the authority of that case, one seeking to recover for services so rendered assumed the burden of proof of establishing, not only the fact

of the rendition of the services and the value of the same but, in addition thereto, that they were performed under an express agreement for compensation, or under such circumstances as were sufficient to show that it was the understanding on the part of both parties that compensation was to be made.

Under the rule established by *Moore v. Moore*, the proof of such family relationship does not of itself constitute a complete defense; but other facts and circumstances must be established by the contestant, showing that it was the design and intention of the parties, at the time of the rendition of the services, that the same were rendered gratuitously. Under the former case, the burden rested upon the claimant of overcoming the presumption arising from family relationship. Under the later decision, the burden of proof cast upon the contestant of establishing other facts and circumstances, in addition to that of the family relation, sufficient to overcome the general presumption that, from the fact of the rendition of meritorious service by one and their acceptance by another, an agreement for compensation will be implied.

The facts in this case, under the rule in *Moore v. Moore*, do not constitute a defense to the claim of the claimant. These facts are similar in many important particulars to those in *Matter of Delaney*, 2 Gibbons Sur. Rep. 470, decided by this court and where a recovery was permitted.

All of the claimant's demand not heretofore paid by the administrator, aside from the one item of fifty-six dollars for clothing, is allowed and to be paid by the administrator from the funds of the estate remaining in his hands for distribution.

A decree will be entered in accordance with the foregoing findings of fact and conclusions of law.

In the Matter of the Judicial Settlement of the Account of the
KINGS COUNTY TRUST COMPANY, as Executor of and Under
the Last Will and Testament of JOHN DOYLE, Deceased.

(Surrogate's Court, Kings County, September, 1910.)

WILLS — INTERPRETATION AND CONSTRUCTION — DISPOSAL OF THE ENTIRE ESTATE—EFFECT OF DEATH, UNCERTAINTY OR INVALIDITY OR INCAPACITY OF LEGATEES OR DEVISEES—EFFECT OF DEATH OF BENEFICIARY IN LIFE OF TESTATOR—OF LEGATEE OF SHARE IN RESIDUE.

Where a testator, in disposing of his residuary estate, gave two-thirds thereof to A. and the other one-third thereof to B., and B. died before the testator, the latter's share does not pass to A. under the will but remains undisposed of by testamentary disposition.

Motion to open and modify a decree.

Gillespie & O'Conner, for Sarah Tyndall, petitioner; James S. McDonough, for Annie Dunn, of next of kin, respondent; Edward R. O'Malley, Attorney-General, for State Treasurer, respondent; George v. Brower, for the Kings County Trust Company; J. Harry Snook, special guardian.

KETCHAM, S.—This is a motion to open and modify a decree upon accounting, made on September 26, 1907, upon the ground that a portion of the estate was disposed of upon an erroneous construction of the decedent's will.

If there was any mistake in the respect alleged, it was a judicial mistake, to be redressed only by appeal. But whether the motion be dismissed or entertained, the result must be the same.

The will contained a residuary gift as follows:

"Two-thirds thereof unto Mistress S. Tyndall * * *
The other one-third thereof unto Ellen McGuirk."

The Ellen McGuirk named in the will died before the death of the testator. The decree proceeded upon the theory that as

to the one-third which would have gone to Ellen McGuirk, if she had survived the testator, there was intestacy.

It is now argued that, upon the failure of the gift of the one-third, the surviving residuary legatee, under a gift to her of two-thirds of the residue, became entitled to the whole residue; and it is sought to amend the decree accordingly.

It is said to be "clear upon the authorities that a part of the residue, of which the disposition falls, will not accrue in augmentation of the remaining parts as a residue of a residue but, instead of resuming the nature of residue, devolves as undisposed of." *Booth v. Baptist Church*, 126 N. Y. 215, 245.

This expression of the law has been repeated and maintained since it was first used by the master of the rolls, in *Scrymasher v. Northcote*, 1 Swanst. 570; *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86, 96.

Under the rule thus defined the decree was right and the motion is denied.

Motion denied.

In the Matter of the Application for the Revocation of Letters of Administration *de bonis non* Granted on the Estate of PAUL J. BRIASCO, Deceased.

(Surrogate's Court, Suffolk County, October, 1910.)

EXECUTORS AND ADMINISTRATORS—APPOINTMENT AND QUALIFICATIONS OF PERSONAL REPRESENTATIVES, RESIGNATIONS AND REMOVALS—RIGHT TO ADMINISTER—IN GENERAL—PRIORITIES OF RIGHT—DE BONIS NON.

Where a decedent whose estate is less than \$3,000 is survived by a widow, his estate passes to his widow in its entirety; and, where letters of administration were issued to the widow and she died before she had completed her administration of her husband's estate, her brother and next of kin to whom administration of her estate has been granted is entitled to letters of administration *de bonis non* under section 2860 of the Code of Civil Procedure in preference to the husband's sister who was not entitled to share in his estate.

Application by Carrie Casazza, an alleged sister, for the revocation of letters of administration *de bonis non* on the estate of Paul J. Briasco, deceased, to Thomas B. McKee.

Louis Julian, for petitioner; Isaac R. Swezey, Jr., for administrator *de bonis non*.

NICHOLL, S.—Paul J. Briasco died August 29, 1909; and, on September 10, 1909, letters of administration on his estate were issued to Ida F. Briasco, his alleged widow. Ida F. Briasco died September 16, 1909; and on September 28, 1909, letters of administration on her estate were issued to Thomas B. McKee, her brother and sole next of kin. On October 8, 1909, letters of administration *de bonis non* on the estate of Paul J. Briasco were issued to said Thomas B. McKee as the only person interested in the estate. Carrie Casazza, alleging herself to be a sister of the decedent, now applies for the revocation of said letters of administration *de bonis non* and for the grant of letters to her, upon the ground that, as a sister, she is priorly entitled to said McKee, who is a stranger.

The application is denied. I find that Carrie Casazza is a sister of Paul J. Briasco and as such becomes heir to his real estate. It does not follow, however, that she is entitled to letters of administration. Such letters are to be granted to relatives, but only to such relatives as are entitled to succeed to the personal property. Code Civ. Pro., § 2660. In most cases heirs and next of kin are the same persons but not always. In this case, the widow having survived the deceased and the estate being less than \$3,000, it passed to the widow in its entirety. Decedent Estate Law, § 98, subd. 3. Consequently the sister has no share therein; and, so far as the grant of letters of administration is concerned, she is in the same class as the present administrator *de bonis non*, that is to say, both are strangers. The present administrator *de bonis non* is, however, the sole ad-

ministrator of the estate of the widow, and as such is entitled to the share in this estate which became vested in the widow, and to that extent has a greater interest than the sister; and, being now under a good and sufficient bond, there appears to be no reason why the present letters should be revoked. The fact that he is a non-resident of the State of New York and that the sister resides in the State is of no consequence in this proceeding, for the reason that he is in turn the sole next of kin of the deceased widow and thus entitled to take as sole beneficiary in the estate of Paul J. Briasca.

The claim was made that Ida F. Briasco was not the lawful wife of Paul J. Briasco and consequently not entitled to the letters of administration which were first issued on his estate. No evidence was offered, however, to support this claim and there is a presumption in law that all letters are regularly issued.

So far as the present proceeding is concerned, therefore, this presumption as to the regularity of letters of administration issued to Ida F. Briesco obtains. The petitioner may have further opportunity, however, to litigate this question upon the accounting when, if she sees fit to raise the issue, it will be then determined, as the decree in that proceeding must fix the person to whom the distribution must be made.

Application denied and injunction dissolved, with costs to the respondent payable out of the estate.

Decreed accordingly.

In the Matter of the Estate of ANNA MASON, Deceased.

(*Surrogate's Court, Monroe County, October, 1910.*)

TAXES—INHERITANCE AND TRANSFER TAXES—PROPERTY AND INTEREST SUBJECT TO TAX—VALUE OF ESTATE.

Under the provisions of the Transfer Tax Law as amended by chapter 706 of the Laws of 1910, the tax upon a legacy of over \$500 bequeathed to an adult child of a testator is one per cent. upon the entire legacy and not upon the amount by which it exceeds the sum of \$500.

Proceedings to fix amount of transfer tax.

William T. Plumb, for State Comptroller; Charles B. Bechtold, for legatees.

BROWN, S.—This is an application to the surrogate to fix the tax in the matter of the above estate upon the deposition filed herein by Mary deTamble and Catharine Mason, executrices of the last will and testament of the deceased.

I find the deceased died on the 6th day of August, 1910, a resident of the county of Monroe, leaving five daughters and two sons; that they are all legatees under her will, and the five daughters are also devisees. The value of their shares in the estate is, respectively, as follows: Mary deTamble, daughter, \$700; Catharine Mason, daughter, \$447.09; Joseph Mason, son, \$550; Elizabeth Mason, daughter, \$447.09; Gertrude Mason, daughter, \$447.09; Margaret Mason, daughter, \$447.09; Leo Mason, son, \$550. It also appears that said sons and daughters are each over the age of twenty-one years.

It is conceded that the respective shares passing to Catharine, Elizabeth, Gertrude and Margaret, whose respective shares are fixed at \$447.09, are not taxable under the present Transfer Tax Act, the amount coming to each of said adult children of

the deceased being of the value of not more than \$500. The contention, however, before the surrogate is as to whether the remaining shares are taxable at the full valuation or only upon the difference between \$500 and their valuation.

There would be no force to this proposition under the Transfer Tax Law existing prior to the amendment made by the Legislature at the extraordinary session thereof in June, 1910, which went into effect on the 11th day of July, 1910. The amended act, as far as is necessary for us to refer to it, reads as follows:

" § 220. *Taxable Transfers.* A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of more than one hundred dollars or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases:

" 1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the State. * * *

" 7. The tax imposed hereby shall be at the rate of five per centum upon the clear market value of such property, except as otherwise prescribed in the next section."

" § 221. *Exceptions and limitations.* When property, real or personal, or any beneficial interest therein, of the value of not more than five hundred dollars, passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter, or any child or children adopted as such in conformity with the laws of this state, of the decedent, grantor, donor or vendor, or to any child to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years there-

after, and provided also that, except in the case of a stepchild, the parents of such child shall have been deceased when such relationship commenced, or to any lineal descendant of such decedent, grantor, donor, or vendor born in lawful wedlock, such transfer of property shall not be taxable under this article; if * * * of more than five hundred dollars, it shall be taxable under this article at the rate of one percentum upon the clear market value of such property except as herein provided. No such tax shall be assessed upon property, real or personal, or any beneficial interest therein so transferred to a father, mother, widow or minor child of the decedent, grantor, donor or vendor, if the amount so transferred to such father, mother, widow or minor child is the sum of five thousand dollars or less; but if the amount so transferred to a father, mother, widow or a minor child is over five thousand dollars the excess shall be taxable at the rate of one per centum upon the clear market value of such property as hereinbefore provided. The rates of taxation hereinbefore prescribed in this and the preceding section are hereby designated as 'primary rates.' Whenever any property, real or personal, or any beneficial interest therein which passes by any such transfer to or for the use of any person or corporation, shall exceed the amount of twenty-five thousand dollars over and above the exemptions hereinbefore provided the rate of taxation shall be as follows:

"Upon all amounts in excess of the said twenty-five thousand dollars and up to and including the sum of one hundred thousand dollars, twice the primary rates. * * *"

Now, it is very clear that the Legislature intended that a father, mother, widow or minor child should not be taxed unless the amount coming to them was in excess of \$5,000, and then only placed the tax on the excess of \$5,000 at the rate of one per cent. for the primary rate. This is a clear exposition of what the Legislature meant. But in the cases of transfers to husband, adult child, brother and sister, etc., above recited,

where the value of such property so transferred is of the value of more than \$500, it is made taxable at one per cent.; and, in the case of other people than those recited in the two above classifications, where the property is of the value of more than \$100, it is taxable at the rate of five per cent. Now, this language is substantially in the same form as the language of the old act. The present act reads in the case of adult children and those in that class, "of the value of more than five hundred dollars." In the previous act it read, "of the value of less than ten thousand dollars," including those included in the present exempt \$5,000 class. The present act relative to the five per cent. class reads, "of the value of more than one hundred dollars." The previous act read, "of the value of five hundred dollars or over."

The courts have held under the old act that, where the amount of the estate passing to children and those of the one per cent. class is \$10,000 or over, the tax is on the whole amount of the estate so passing, and not on the overplus beyond \$9,999; and that, where an estate to collaterals of over \$500 passes to collaterals in the five per cent. class, the tax is on the whole amount so passing, instead of on the excess beyond said \$500.

The Legislature is presumed to know what interpretation the courts have placed upon its acts; and, when the Legislature amended said act using similar language, it is to be presumed that they intended to adopt the ruling of the courts as to the meaning of such language; and particularly is that so where, in another part of the act, the Legislature says, with extreme precision, that it intends to make a different rule relative to a father, mother, widow or minor child.

Our attention is called to the words of the act where it says: "Whenever any property, real or personal, or any beneficial interest therein, which passes by any such transfer to or for the use of any person or corporation shall exceed the amount of twenty-five thousand dollars over and above the exemptions

hereinbefore provided, the rate of taxation shall be as follows,
* * * " that the word "exemptions," being in the plural, shows the intent of the Legislature to include more than is intended under the "amount so transferred to such father, mother, widow or minor child."

I cannot regard that argument as having any force upon the construction of the words of the act submitted. The plural of the word is properly used, as referring to exemptions granted, not only under the \$5,000 exemption, which includes the plural of the parties entitled to such exemption, to wit, father, mother, widow or minor child, but also as referring to the exemptions of \$500 or under given to adult children in cases where the amount coming to such adult children is limited to that amount, and also as referring to the hundred dollars exemptions given to strangers to the blood and collaterals in the five per cent. class, where the amount coming to them is within the limitation of \$100. And, even if the word "exemptions" were used without resorting to the above argument, it would be hardly reasonable to assume that the mistaken use of the plural for the singular would justify this court in changing the interpretation placed upon similar words in the previous act, amended by the act now before us, where, as we have said before, such precision is used in making the change relative to father, mother, widow or minor child.

I am of the opinion that the transfer of property under the Transfer Tax Act (as amended in June, 1910, and going into effect on the 11th day of July, 1910), of the value of not more than \$500, to an individual or corporate legatee, devisee, heir at law or next of kin, under those provisions, is *not* taxable, but is a limited exemption up to that amount to each such legatee, devisee, heir at law or next of kin; but that, when the amount of property so passing to any one of such class is over \$500, then the whole amount (not the excess over \$500 only) is taxable at the rate of one per cent. primary rate; and, where the transfer

of property of not more than \$100 passes to collaterals and strangers to the blood in the five per cent. primary class, that the same is *not* taxable, but is a limited exemption to that amount thereof is of the value of more than \$100, then the whole amount thereof (not the excess over \$100 only), so passing to each collateral or stranger to the blood in the five per cent. primary class, is taxable at the five per cent. primary rate.

This is in conformity with *Matter of the Estate of Sherwell*, 125 N. Y. 376; opinion written by Judge Gray, in which all concurred. *Matter of Corbett*, 171 N. Y. 516; *Matter of Hoffman*, 143 id. 327.

Accordingly, I hold that the property passing to Mary deTamble, Joseph Mason and Leo Mason, children of the decedent, of full age, from the estate of their deceased mother under her will in excess of \$500 each, is taxable at the full valuation thereof at the rate of one per cent. The other children being adults, and the amount received by them being not more than \$500 in value, the property passing to them is not taxable. The legacy of \$100 left to the executors in trust for the payment of masses is not taxable.

Let an order be entered accordingly to the terms of this decision, without costs to either party as against the other.

Decreed accordingly.

In the Matter of the Estate of FRANK SCUTELLA, Deceased.

(*Surrogate's Court, Cattaraugus County, November, 1910.*)

CONSULS—APPEARANCE IN LITIGATION AFFECTING FOREIGN INTERESTS—SUBJECTS OF ITALY.

EXECUTORS AND ADMINISTRATORS—APPOINTMENTS AND QUALIFICATIONS OF PERSONAL REPRESENTATIVES, RESIGNATIONS AND REMOVALS—RIGHT TO ADMINISTER—ESTATES OF ALIENS—ITALIAN SUBJECTS.

Under the treaties with the Kingdom of Italy its consular officers enjoy the rights, prerogatives, immunities and privileges accorded to

the "most favored nation" in respect to the administration of the estates of Italian subjects who may die in the United States and who have no known heirs or testamentary executors designated by them.

In respect to such matters it is commonly understood that, under the provisions of the treaty between the United States and the Argentine Republic, the last named republic for such purpose should be regarded as the most favored nation.

Article IX of the treaty between the United States and the Argentine Republic, which provides that if any citizen of either party shall die without will or testament in any territory of the other the consul general or consul of the nation to which the deceased belongs, or his representative in his absence, shall have the right "to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs," is to be construed as entitling the proper consular officer to notice of all judicial proceedings relating to the effects of the deceased, and the further right to intervene or become a party to such proceedings as the representative of foreign creditors, heirs and next of kin, but not as affording such consular officer the absolute and exclusive right to letters of administration without bond or security.

Reversed 145 App. Div. 156.

Application for letters of administration upon the estate of an intestate.

Nevins & Black, for petitioner; Lanza & Miceli, for Italian Consul.

DAVIE, S.—Scutella died at Olean, Cattaraugus county, July 15, 1910. At the time of his death he was a subject of the Kingdom of Italy, where he left him surviving next of kin, but having no heir at law or next of kin in the United States. A petition for administration upon his estate is filed by a resident creditor of the decedent which alleges that decedent died intestate; that he owned no real estate and that his personal effects exceed the sum of fifty dollars, and that no right of action exists, granted by special provision of law, "except against the Pennsylvania Railroad Company for negligently killing the dece-

dent." The evident necessity for administration was to procure the requisite authority for prosecuting such claim. A citation was duly issued, directed to and properly served upon the Italian Consul, who appeared in this proceeding, objects to the appointment of the petitioner and asks that administration be granted to him without filing any bond, basing his right to administration upon the provisions of the treaty between the United States and Italy, which is more particularly hereinafter referred to. Hence the determination of this controversy involves the necessity of carefully considering the phraseology of the treaty and the evident purposes sought to be subserved thereby. The portions of the treaty bearing upon this proposition are articles IX, XVI and XVII.

Article IX is as follows: "Consuls General, Consuls, Vice Consuls and Consular Agents may have recourse to the authorities of the respective countries within their district, whether federal or local, judicial or executive, for the purpose of complaining of any infraction of the treaties or conventions existing between the United States and Italy, as also in order to defend the rights and interests of their countrymen. If the complaint should not be satisfactorily redressed the consular officers aforesaid, in the absence of a diplomatic agent of their country, may apply directly to the government of the country where they reside."

Article XVI is as follows: "In case of the death of a citizen of the United States in Italy, or an Italian citizen in the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the Consuls or Consular Agents of the nation to which the decedent belonged to the end that information may be at once transmitted to the parties interested."

Article XVII is as follows: "The respective Consuls General, Consuls, Vice Consuls and Consular Agents as likewise the Consular Chancellors, Secretaries, Clerks, or Attaches, shall en-

joy in both countries all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most favored nation."

It is commonly understood that, under the provisions of the treaty between the United States and the Argentine Republic, the last named Republic, for the purposes under considered, is regarded as the "most favored nation."

Article IX of that treaty is as follows: "If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the Consul General or Consul of the nation to which the deceased belonged, or the representatives of such Consul General or Consul in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

Accordingly, this controversy must be determined in the same manner as if article IX of the Argentine treaty had been incorporated in and constituted a part of the treaty between the United States and Italy. What then is the actual meaning and legal effect and interpretation of article IX above quoted? When such meaning is ascertained it becomes a part of the supreme law of the land.

Article II of the Constitution of the United States provides that the President shall have the power, by and with the advice of the Senate, to make treaties, provided two-thirds of the senators present concur. Article VI of the Constitution declares the legal status and effect of treaties when so consummated in the following terms: "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the

constitution or laws of any state to the contrary notwithstanding."

There can be no controversy or misunderstanding in relation to the actual status of *treaty law* nor in regard to the general rules applicable to the construction of the same. "In construing the language of treaties the courts will adopt the same general rules which are applicable in the construction of statute, contract and written instrument generally in order to carry out the purpose and intention of the makers." 28 Am. & Eng. Ency. of Law, 488.

"As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization and as their main object is not only to avoid war and secure lasting peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in the broad and liberal spirit which is calculated to make for the existence of a perpetual amity so far as can be done by one without the sacrifice of individual rights or the principles of personal liberty which lie at the foundation of jurisprudence." 28 Am. & Eng. Ency. of Law, 490. Treaties are to be liberally construed. *Shanks v. Dupont*, 3 Pet. 242.

When treaty provisions conflict with the laws or Constitution of any State, the former must prevail. *Matter of Parrott*, 1 Fed. Rep. 481; *Hausenstein v. Layman*, 100 U. S. 483; *United States v. Forty-three Gallons of Whiskey*, 93 id. 188, 197; *Head Money Cases*, 112 id. 580, 598; *Tellefsan v. Fee*, 168 Mass. 188.

These authorities do not indicate that any different rules of construction prevail when considering international treaties than in considering and construing contracts and legislative enactments. They are to be reasonably construed, not by ascertaining the technical meaning of any segregated word, phrase or sentence, but from the entire provision and the evident purposes sought to be subserved thereby. What, then, is the effect to be given to the phraseology of the Argentine treaty: "The

Consul General, etc., shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased conformably with the laws of the country for the benefit of the creditors and legal heirs?"

The best method of comprehending the scope of any legislative enactment or treaty provision is a correct understanding of the conditions prompting the same. What were the conditions, existing or anticipated, which led to the incorporation of the provision quoted in the treaty with the Argentine Republic? Evidently the knowledge that the subjects of one country, while temporarily sojourning in the other, might die there possessed of effects which, without authoritative supervision, might come into the possession of and be dissipated by irresponsible persons and thereby lost to those legally entitled to the same. No other incentive or purpose can be suggested for such treaty provision. To effectuate such purpose it became necessary to designate some competent and responsible representative to protect the rights of foreign creditors, heirs and next of kin—a representative who should be entitled to notice of all judicial proceedings relating to such effects, and possess the further right to intervene, or become a party to such proceedings as the representative of such absentees. Such a method of procedure would secure to the subject of the Argentine Republic precisely the same rights and protection in this particular as were extended to our own citizens. What more could be expected or desired? It certainly was not the design or intention of the treaty-making powers that the subjects of one country should, through the instrumentality of the treaty provisions, derive superior right and advantages over the citizens of the other nation, but that they should be placed in the same or an equal position for the protection and distribution of the assets in which they were interested. Such construction would give to all parts of the provision quoted its natural and reasonable effect; it would not pervert the meaning of the term "intervene" which signifies "to

come in " or " to come between " (Webster's Dict.); it would be strictly in accordance with the legal significance of the term "intervene," for the right to intervene in judicial proceedings is a right to be heard with others who may be similarly situated. Matter of Logiorato, 34 Misc. Rep. 31.

The phraseology "conformably with the laws of the country" is exceedingly significant in this connection. In place of indicating a design to abrogate or supersede local legislation regarding administration, it shows a purpose and design of extending to the estate of the alien who had died within the jurisdiction of our local courts the same protection as was provided for the administration of the estates of our own citizens. Nor do the words "intervene in possession" detract to any extent from the force of this conclusion; because it would be both necessary and proper for the foreign representative to intervene in the possession of such portion of the assets as were determined through the instrumentality of administration to belong to the absentees so represented.

If the construction contended for by the Italian Consul were to prevail, disastrous results to our own citizens might ensue; for assuming that his right to administer is absolute and exclusive, that letters are issued to him without bond or security, and the assets all turned over to him and he removes or sends the same outside the jurisdiction of our courts, what possible remedy or redress would a resident creditor have?

A question similar to the one under consideration was passed upon by the Supreme Court of the State of Louisiana, in 1854, in Succession of Charles Thompson, 9 La. Ann. 96. In that case letters of administration had been granted, pursuant to the laws of the State of Louisiana, of the decedend's effects to the official curator. The petitioner was the vice-consul of the Kingdom of Norway and Sweden; and, in his capacity as such consul, he claimed the right to take succession out of the hands of the administrator so appointed. He based such alleged right

upon the general laws of nations, the laws of the United States and, especially, upon the provisions of the treaty entered into between the United States and the Kingdom of Norway and Sweden. The court in disposing of such controversy said: "The rights claimed are incompatible with the sovereignty of the State, whose jurisdiction extends over the property of foreigners as well as citizens while within its limits; the disposition of the estates of foreigners has been made the subject of special legislation and no treaty or law of the United States exists, which, as paramount law, confers any such right as is claimed by the petitioner; nor are we aware of any principle of the law of nations which would entitle the petitioner to call into question the authority of our laws on that subject."

In the English courts, the same question was considered in *Aspinwall v. The Queen's Proctor*, 2 Curt. 241, 244. In that case an application was made to the Prerogative Court of Canterbury by an American Consul for administration upon the estate of an American who had died while temporarily sojourning in England, leaving property within the territorial jurisdiction of the English courts. The application was denied and substantially the same conclusion reached as in the Louisiana case.

If it had been the design, in formulating the treaty provisions, to give the Italian Consul or the other officials designated the first and exclusive right to administer, it would have been entirely practicable to have incorporated in the treaty a concise and unambiguous provision to that effect. In fact, in the treaty between the United States and Peru precisely that was done. That treaty provides that "In the absence of legal heirs or representatives the Consul or Vice Consul of either party shall *ex officio* be the executor or administrator of the citizens of their nation who may die within their consular jurisdiction."

In this matter, however, the Italian Consul does not predicate his demand upon the provisions of the Peruvian treaty, but,

as already indicated, upon the provisions of the treaty with the Argentine Republic, regarding that nation as the "most favored nation" within the purview of the meaning of that expression as used in the treaty between the United States and Italy.

The conclusions reached in this matter are not based upon the same grounds nor prompted by the same considerations as those in the Louisiana case, viz., unwillingness to tolerate any infringement upon individual State rights, but upon the broader ground of the reasonable construction of the phraseology of the provisions of the treaty under consideration, having in view the purposes for which such treaty was made. Nor have I overlooked in the consideration of this matter the elaborate and lengthy opinion of the learned surrogate of Westchester county in Matter of Lobrasciano, 38 Misc.Rep. 415; but I am constrained to adopt the reasoning in Matter of Logiorato, 34 id. 31.

A decree will accordingly be entered, granting administration to the petitioner and directing the issuing of limited letters to him and denying the application of the Italian Consul for appointment.

Decreed accordingly.



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Where, upon the judicial settlement of the accounts of the administrator, said judgment creditors filed proof of their respective claims and asked that said judgments be paid from the estate, the burden is upon them to show that their claims were not released by the decedent's discharge in bankruptcy.

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remained for several months, receiving such medical attention from the daughter as she required; and where, later, the mother again went to the daughter's residence, to visit, and was taken there with her last illness, during which, for five weeks before her death, the daughter, with the help of a nurse, gave her constant care, attention and nursing, the circumstances are not such as to raise a presumption that the daughter's services were intended to be rendered gratuitously, in the absence of any express agreement relating thereto. *Matter of Parker*. 562

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Where an executor, upon the judicial settlement of his account, claims that a bond and mortgage formerly belonging to the testatrix, his sister, were given to him by her in her lifetime; and his wife testifies that while the testatrix was living with them she wrote upon the bond and mortgage the words "Jany 31 I have given this have given to Peter" and signed her name and tendered the papers to her brother Peter in the presence of the witness, saying, "I give you this Mallory mortgage," and he, having his arms full of wood and being unable to take it, asked his sister to hand it to the witness, which she did, and the witness afterward put it back with other papers in a box which was used in common by the family, a gift of the bond and mortgage is sufficiently established. Matter of Van Derzee.. 400

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Where, upon an application by a male infant, nineteen years of age, for the appointment of a guardian of his property, he nominates another person than his mother, and the mother opposes the appointment of the nominee and prays that letters be issued to her, and it appears that the infant's motive is to humiliate his mother and indicate his independence in business affairs, and the mother's motive is to demonstrate to her son her maternal rights and enforce complete

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The intention which the law imputes to husband and wife who deposit moneys to their joint credit, that the money shall belong to the survivor, is founded not upon the legality of their marriage relation but upon the impulses which it has been found ordinarily affect persons sustaining such a relation to each other.

Such an intention is not repelled by the fact that their marriage was unlawful by reason of the husband having a prior wife living at the time of its solemnization.

Nor is the arrangement that the woman sustaining to him the apparent relation of wife should receive portions of the money from time to time at the discretion of a third person, made by the supposed husband in preparation for his departure to a foreign country, inconsistent with the intention that in case of his death she should have it all. *Matter of Eysel*. 349

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INFANTS—DISABILITIES IN GENERAL—CAPACITY TO INSTITUTE LEGAL PROCEEDINGS—INFANT JOINED WITH ADULT.

Where proceedings have been commenced, to revoke letters testamentary granted to an executor, by the joint petition of an infant legatee and her father who is also a legatee, but for a nominal amount, the petition will not be dismissed on the ground that one of the petitioners is, by reason of infancy, incapable of maintaining the proceeding. *Matter of Denyse*. 123

INSANE PERSON.

1. PROPERTY AND LIABILITIES OF INCOMPETENTS—LIABILITY OF ESTATE FOR DEBTS AND CLAIMS. See *Matter of Stiles*..... 290

2. SAME—RIGHT AND TITLE OF COMMITTEE. See *Matter of Scharrmann*. 230

INSURANCE.

- INSURANCE—ASSIGNMENT OR TRANSFER OF POLICY—RIGHT TO MAKE ASSIGNMENT—ASSIGNMENT BY WIFE OF POLICY ON HER HUSBAND'S LIFE IN HER FAVOR—DISPOSAL BY WILL ON DEATH BEFORE HUSBAND. See *Matter of Pool*. 379
See NOTE, 384.

JUDGMENT OF DIVORCE.

- COLLATERAL ATTACK—WANT OF JURISDICTION—EFFECT OF RECITALS IN JUDGMENT RECORD.

The statement contained in a judgment of divorce granted in a foreign State that the defendant failed to appear is conclusive upon the plaintiff; and a waiver of service of notice of taking depositions in the action filed therein and purporting to be signed by the defendant's attorney does not suffice to establish the fact of the defendant's appearance.

But where the record of the foreign court was thereafter, on the plaintiff's motion, duly corrected by striking out such statement from the judgment and inserting in its place a statement that the defendant appeared personally in the action, full faith and credit should be given thereto, and the plaintiff's subsequent marriage in this State is to be held valid and her right to administer upon the estate of her husband by such marriage should be upheld. *Matter of Higgins*. 533

JURISDICTION.

1. NATURE AND EXTENT OF JURISDICTION—ADMINISTRATION OF DECEDENTS' ESTATES—ACCOUNTING AND DISTRIBUTION IN GENERAL—ESTATE WHEN READY TO BE DISTRIBUTED.

An estate is "ready to be distributed," within the meaning of section 2743 of the Code of Civil Procedure, when its resources have been gathered and marshaled so that their extent and nature are known and the expenses and obligations of the estate have been ascertained; and the expression "ready to be distributed" does not mean that a direction for the final disposition of the estate can only be made when it has been wholly reduced to money. Where there still remains property which has not been turned into cash, a complete decree may be made, in which the property may be taken at an estimate of its present value, however nominal or tentative; and, upon a change of circumstances, further direction may be made upon the foot

- of the decree, the enforcement of which, in the meantime, may be subject to regulation and restraint. *Matter of Snedeker*..... 23
2. NATURE AND ESSENTIALS IN GENERAL—PRESUMPTIONS—EFFECT OF RECITALS IN JUDGMENT. See *Matter of Higgins*..... 331
3. SAME—ADMINISTRATION OF DECEDENTS' ESTATES—SETTLEMENT OF CLAIMS ON ACCOUNTING BY REPRESENTATIVES—CLAIMS AGAINST REPRESENTATIVES—PROCEDURE AND REVIEW—HEARING, REHEARING AND DECISION—DECISION—SUSPENDING DECISION PENDING DECISION IN OTHER COURT.
- The Surrogate's Court has no jurisdiction, upon the settlement of the accounts of a testamentary trustee who is also one of the beneficiaries of the trust, to pass upon a claim that he should account to the estate for the injury inflicted upon it by reason of his having joined with other beneficiaries in the purchase of a portion of the real estate for their own interest and profit.
- And the court will not examine such dealings of the trustee with the estate in order to determine whether or not the trustee is entitled to commissions and thus make an adjudication conclusive upon the parties, but will reserve the question of commissions and leave the parties to settle the question of the trustee's liability in the Supreme Court where complete relief may be given. *Matter of McInerney*.... 114
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- Where a doubtful question as to the construction of a will is involved in an action pending in the Supreme Court for the partition of real property, the Surrogate's Court will not pass upon the question on a summary application to revoke letters of administration *cum testamento annexo*, though the question is also involved in the latter proceeding, but will dismiss the application without prejudice to a renewal thereof after the termination of the action. *Matter of Dunn* 175
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- See BANKRUPTCY.

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MODE AND SUFFICIENCY OF PAYMENT—LEGACY.

Where a niece who has lived with her aunt and has been brought up by her after reaching mature years leaves her and engages in different pursuits; but later when her aunt after absence in another State returns to her former home in feeble health the niece goes to live with her and does the work of the household until the aunt's death, for which the aunt told her she should be well paid, and it appears that the niece expected such compensation to be made by the aunt's will, and the aunt makes provision for the niece in her will to an amount in excess of the fair value of her services, the legacy is to be regarded as having been intended as compensation for her services, and a claim in addition thereto should be disallowed. *Matter of Seeley*..... 499

See NOTE ON ABATEMENT OF LEGACIES, 249.

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LIFE ESTATES.

LIABILITIES AS BETWEEN LIFE TENANTS AND REMAINDERMEN—RIGHT IN GENERAL—CARRYING UNPRODUCTIVE PROPERTY.

The charges for carrying unimproved and unproductive property withheld by testamentary trustees from the market for the eventual benefit of the remainder, where the trustees have acted in the exercise of a sound discretion and the property has appreciated in value sufficiently to justify their management, should be charged upon the fund and not upon the income of the life tenant. *Matter of Coombs*.. 131

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1. REVIVAL OF OBLIGATION—ACKNOWLEDGMENT AND NEW PROMISE—FORM OF PROMISE—PRESENTATION OF CLAIM AND ALLOWANCE BY EXECUTRIX.

The presentation to an executrix by a creditor of the decedent of a claim against his estate and its allowance by the executrix is a liquidation of the claim and fixes a new date for the running of the Statute of Limitations. Such presentation and allowance, in the absence of fraud or collusion, establishes the validity of the claim as effectually as a judgment against the executrix. *Matter of Nelson*..... 216

2. ACCRUAL OF CAUSE OF ACTION—ACTION AGAINST COTENANT FOR CONTRIBUTION. See *Matter of Woods*. 542

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2. SAME—FACT—SUFFICIENCY—COMMON LAW MARRIAGE.

Where a husband after the death of his wife, from whom he had been living separate and apart for several years, agreed with the woman who had been his mistress since the separation to live together as man and wife and they did so live until his death; and, though no ceremonial marriage took place, the testimony is clear that from the death of his wife he, by declarations verbal and written, conduct, repute and reception among neighbors, acknowledged her to be his wife and her child by him born before the death of his wife to be his lawful son, the former mistress will be held to be the lawful wife of decedent and his widow and entitled to letters of administration upon his estate and said son legitimate. See *Matter of Terwilliger*..... 184

3. IN GENERAL—VALIDITY OF MARRIAGE—AFTER ABSENCE FOR FIVE YEARS—RETURN OF FORMER HUSBAND—RIGHTS OF WIFE IN SECOND HUSBAND'S ESTATE. See *Matter of McKinley*..... 387

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2. SAME—RIGHTS AND REMEDIES OF SURETY AGAINST PRINCIPAL—RECOVERY OVER. See Matter of Darrow..... 240

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In appraising the interest of one of several cotenants of real property for the purposes of the transfer tax, allowance should be made for contribution for improvements made by cotenants, though not within the statutory period. *Matter of Wood*..... 542

4. SAME—APPRAISAL—DEDUCTION OF ADMINISTRATION EXPENSES.

The value of the estate of a deceased person for the purposes of the transfer tax is not to be diminished by the expense of litigation over the relative rights of the distributees among themselves, though such expense may diminish their individual shares.

But the expense incurred in resisting a claim to the entire estate by one who alleges an agreement with the deceased pursuant to which he was to have the decedent's entire estate at his death should be deducted from the value of the estate in making an appraisal. *Matter of Sanford*. 395

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6. SAME—EXEMPTIONS—HOSPITALS—BENEVOLENT ASSOCIATIONS.

Although the services of patients at the Craig Colony for Epileptics are utilized upon its lands to grow foods, or to make products which may be sold by the State and the proceeds used to purchase necessities for the support of the colony, it is, nevertheless, within the meaning of section 221 of the Tax Law, conducted "exclusively" for the charitable and other purposes specified in the section; and a legacy to it is exempt from transfer tax.

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- REPRESENTATIVES—ADJUDICATION CONCLUSIVE IN SUBSEQUENT PROCEEDINGS FOR ACCOUNTING. See Matter of Welch..... 6
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- STATUTES—ENACTMENT AND VALIDITY IN GENERAL—PRESUMPTIONS TO SUPPORT. See Matter of Porter. 443

SUBROGATION.

VOLUNTARY PAYMENT—PAYMENT OF DECEDENT'S DEBTS BY ADMINISTRATRIX.

An administratrix by voluntarily paying off and discharging with her own funds debts of the decedent does not become entitled to be subrogated to the rights of the creditors and to assert their claims in proceedings for the sale of the decedent's real property for the payment of his debts. Matter of Rider..... 545

SUSPENSION OF POWER OF ALIENATION.

- EFFECT OF SEPARABILITY OF ESTATES—SEPARATE TRUSTS FOR MORE THAN TWO LIVES. See Matter of Hoffman..... 306

TAXES.

1. INHERITANCE AND TRANSFER TAXES—ASSESSMENT—APPRAISAL—DEDUCTION OF ADMINISTRATION EXPENSES—DEDUCTION OF COMMISSIONS OF REAL ESTATE BROKER.

Where legacies are charged upon real estate and the necessity for the sale of the lands is clear, commissions of a broker upon such sale should be allowed as a necessary expense of administration upon the appraisal of the estate for the transfer tax. Matter of Rothschild. 204

2. SAME—APPRAISAL—DEDUCTION OF ADMINISTRATION EXPENSES—DOUBLE COMMISSIONS TO EXECUTORS.

Where an estate amounts to less than \$100,000 at the death of a testator but more than that amount comes to the hands of the executors by the subsequent accrual of interest, each executor is entitled to full commissions, and separate commissions should be deducted in appraising the estate for the transfer tax. Matter of Van Pelt.. 206

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When a wife, resident in the State, dies without a will, leaving her husband and no descendants, the husband does not take her personal

- estate by virtue of the intestate laws of the State, and there is no taxable transfer thereof. *Matter of Green*..... 510
10. **SAME—VALUE OF ESTATE.**
 Under the provisions of the Transfer Tax Law as amended by chapter 706 of the Laws of 1910, the tax upon a legacy of over \$500 bequeathed to an adult child of a testator is one per cent. upon the entire legacy and not upon the amount by which it exceeds the sum of \$500. *Matter of Mason* 502
11. **ESTATE BY APPOINTMENT BY WILL PURSUANT TO WILL OF REMOTE ANCESTOR.**
 Where a daughter by her father's will had the benefit of a trust fund thereby created during life and the power to appoint the persons to receive it at her death, and his will further provided that, if she should fail to make such appointment, the fund should go to her issue; and where the daughter by her will appointed the same persons to receive the fund to whom it was given by the will of her father, she effected nothing by such appointment, since the appointees already had a vested remainder under her father's will; and their interests are not liable to taxation as if transferred to them by the will of the daughter. *Matter of Chapman* 50
12. **SAME—ASSESSMENT—REVIEW OF PROCEEDINGS—EFFECT OF FORMER APPEAL.** See *Matter of Warren*..... 118
13. **SAME—PROPERTY PASSING UNDER POWER OF APPOINTMENT.**
 The transfer of such property as is located in this State, only, is taxable where such transfer is effected by the exercise by a resident of the State of New Jersey of a power of appointment created under the will of a resident of this State who died in 1886. *Matter of Kissel* 361
14. **SAME—DEPOSIT IN BANK—TO CREDIT OF HUSBAND AND WIFE JOINTLY.**
 The deposit by husband and wife of moneys belonging to each to their joint credit in a savings bank does not indicate a gift *inter vivos*, but an intention that, on the death of either, the funds belonging to the one dying shall pass to the survivor; and, upon the death of either, the transfer of that part of the deposit so passing to the survivor is taxable. *Matter of Kline* 364
15. **SAME—TRANSFER BEFORE DEATH.** See *Matter of Jones*..... 302
16. **SAME—TRANSFERS BEFORE DEATH—TRANSFERS IN CONTEMPLATION OF DEATH.**
 Gifts or grants made in contemplation of the death of the donor or grantor and taxable under the laws relating to taxable transfers are not limited to gifts *causa mortis* but extends to gifts *inter vivos* which are made by the donor in contemplation of death. *Matter of Price* 68
17. **SAME—PROCEEDS OF LANDS IN FOREIGN STATE UNDER CONTRACT OF SALE.**

- Where at the time of a decedent's death she had contracted to sell lands owned by her in another State and had signed and sealed a deed thereof which was afterward delivered, the proceeds of the sale received by her representatives after her death are not taxable under the law relating to taxable transfers. *Matter of Baker*..... 502
18. SAME—PROPERTY SITUATED IN ANOTHER STATE—ASSESSMENT—APPRAISAL—OF PARTICULAR PROPERTY—GOOD WILL OF BUSINESS. See *Matter of Vivanti*. 207
19. SAME—PROPERTY AND INTEREST SUBJECT TO TAX—PROPERTY SITUATED IN ANOTHER STATE—ASSETS DISTRIBUTED THEREUNDER—CLAIM OF DOMICILIARY ADMINISTRATION.
- Where assets of a deceased person in California are distributed there under the intestate laws of that State pursuant to a decree which adjudges the decedent to have been a resident of that State and do not come to the hands of the executor in New York, they will not be taxed here; though by a subsequent decree in New York it is adjudged that the decedent was at the time of his death a resident of this State. *Matter of Cummings*. 211
20. SAME—ASSESSMENT—APPRAISAL—DEDUCTION OF ADMINISTRATIVE EXPENSES—DEDUCTION OF DOWER. See *Matter of Shields*..... 538

TRUSTS.

1. PURPOSES FOR WHICH EXPRESS TRUSTS ARE VALID—PASSIVE TRUSTS. See *Matter of Martinus*. 315
2. SAME—SERVICES TO BE PERFORMED AFTER DEATH OF GRANTOR—MASSES. A direction to executors to pay and expend certain sums from time to time in their discretion for the expense of Roman Catholic masses for the repose of the souls of the testatrix and her parents is a gift to the executors for a religious use upon a valid and effectual trust and taxable at the rate of five per cent. *Matter of Eppig*..... 202
3. THE BENEFICIARY, HIS ESTATE, RIGHTS AND INTEREST—RIGHTS OF BENEFICIARY OF INCOME—WHAT IS INCOME. See *Matter of Carey*.... 194
4. SAME—THE BENEFICIARY, HIS RIGHTS AND INTEREST—RIGHTS OF BENEFICIARY TO INCOME WHERE BENEFICIARY IS INCOMPETENT.
- Under a trust to apply the income, revenue and profit of the testator's estate to the maintenance and use of his two sons during their natural lives, the beneficiaries are entitled to the entire income; and, where they are incompetent, it should be paid to their committee. *Matter of Schaffmann*. 230
5. THE TRUSTEE, APPOINTMENT, QUALIFICATION, RESIGNATION AND REMOVAL—BONDS AND OBLIGATIONS—BOND OF TESTAMENTARY TRUSTEE—WHEN TO BE REQUIRED: EXECUTION AND ADMINISTRATION OF TRUST—INVESTMENTS—ASSETS OF BENEFICIARY. See *Matter of Carr*.... 367

6. SAME—COMPENSATION—HALF COMMISSIONS—UPON INTERMEDIATE ACCOUNTING; PROPERTY FORMING BASIS OF ALLOWANCE.

One appointed by the surrogate to execute the unexecuted trust upon the death of a testamentary trustee is entitled, upon the first intermediate accounting, to one-half commissions upon the principal of the estate. *Matter of Silliman*..... 451

7. IMPLIED TRUSTS—IN GENERAL.

Where no reason appears why a testatrix should have intended to give her estate absolutely to the person named in her will as the sole legatee, whom she had known but a short time, the gift thereof to him "to use as he may desire in the Master's work" will not be taken as intending an absolute gift but as an attempt to create a trust which is ineffectual because the objects and purposes of the testatrix are so undefined and the beneficiaries are so indefinite and uncertain that the court could not direct the manner in which her intention should be carried out. *Matter of Seymour*..... 487

8. TERMINATION AND ABROGATION OF TRUST—FULFILLMENT OF PURPOSE. See *Matter of Farmers' L. & T. Co.*..... 564

9. ACCOUNTING AND DISCHARGE—RELIEF GRANTED.

The decree to be entered upon the accounting of a deposed trustee must require the estate to be turned over to his successor in money, in the absence of special convention to the contrary.

In such case the removed trustee is entitled to a clear title to doubtful assets either before or at the time of the decree requiring the payment of the fund in cash. *Matter of Boyer*..... 516

WILL.

1. DISPOSAL BY WILL—RIGHT OF DISPOSAL AND MATTERS DISPOSABLE BY WILL—CORPORATIONS AND LEGAL ENTITIES: INTERPRETATION AND CONSTRUCTION—TERMS DEFINING THE NATURE AND QUALITY OF ESTATES OR INTERESTS—FIDUCIARY OR INDIVIDUAL, LEGAL OR EQUITABLE AND OTHER QUALIFIED INTERESTS—TRUSTS IMPLIED—FROM PRECATORY WORDS.

A provision of a will for the perpetual care of the testator's cemetery lot outside the State of New York and the lettering of the monument standing upon it is valid as a trust of the testator's personal estate.

The further provision that the remainder of his personal estate be disposed of by two persons named therein "as they think best, we having advised with them thereof, and left the disposal of any residue of our estate to their judgment as may seem best to them at that time," without any further directions to the legatees as to the disposition to be made of the estate by them, either secretly or by the terms of the instrument, suffices to pass the remainder and residue of the personal property to the legatees absolutely. *Matter of Perkins*. 529

2. SAME—MISTAKE, FRAUD AND UNDUE INFLUENCE, ETC.—GENERAL RULES—
UNDUE INFLUENCE—APPEALS AND PERSUASIONS.

Where a testator, after having made a will giving his wife the use of his estate, which consisted of the house and lot in which they resided, for life, with remainder to a son by a former wife, a man in middle life and able to provide for himself, on the same day, after a long interview between the husband and wife in the office of the attorney who drew the will and as the result of the tearful argument and persuasion of the wife who was enfeebled in health and advanced in years, made a new will giving his estate to her absolutely, it cannot be inferred from the circumstances of the transaction that the testator was subjected to undue influence in the making of the latter will. *Matter of Hall*..... 571

3. SAME—EVIDENCE—DEVISE OR LEGACY TO COUNSEL OR DRAFTSMAN—HUSBAND AS DRAFTSMAN—THE TESTAMENTARY INSTRUMENT OR ACT—EXECUTION OF WILL—EVIDENCE OF EXECUTION—ATTESTATION CLAUSE—NOT EVIDENCE OF FACTS STATED—SUFFICIENCY OF EVIDENCE—CIRCUMSTANCES SUPPORTING PROOF BY HANDWRITING.

Where the three subscribing witnesses to a will having no attestation clause are dead, but their handwriting and that of the testatrix is established, and it affirmatively appears that at the time of the transaction the decedent was competent to make a will and was under no restraint, the will, though in the handwriting of the testatrix's husband to whom the whole estate was devised, will be admitted to probate. *Matter of Abel*..... 168

4. VALIDITY, OPERATION AND LEGAL EFFECT—IN GENERAL—CY PRES DOCTRINE.

A bequest to one who is the treasurer of a hospital in trust to be used as she may deem best towards the interest of the hospital is valid under the provisions of chapter 701 of the Laws of 1893 as amended by chapter 291 of the Laws of 1901.

Nor does such bequest contravene the provisions of section 6 of chapter 319 of the Laws of 1848 as amended by chapter 623 of the Laws of 1903 because the will was executed within two months preceding the death of the testatrix. *Matter of Beaver*..... 74

5. ESTABLISHMENT AND ANNULMENT—PROBATE—PROCEDURE—EVIDENCE—DECREE OF FOREIGN PROBATE COURT.

In a proceeding for the probate of a will in a Surrogate's Court of this State a judgment of a Probate Court in a foreign State admitting to probate an alleged subsequently executed will of the decedent, such Probate Court being an inferior court of limited jurisdiction and not capable under the laws of such State of becoming a final or conclusive adjudication, until the expiration of the period allowed by the laws of that State for the commencement of an action or proceeding

in a Circuit Court to determine the validity of the will, and then only in the event that no such action or proceeding has been commenced within the prescribed period, is not admissible in evidence where such action has been brought in the Circuit Court under the laws of such foreign State. *Matter of Sands*..... 64

6. THE TESTAMENTARY INSTRUMENT OR ACT—JOINT OR MUTUAL NUNCUPATIVE OR FOREIGN WILLS—NUNCUPATIVE WILLS—WHEN ALLOWABLE OR PROPER; EVIDENCE AS TO MAKING OF NUNCUPATIVE WILL: PROBATE ESTABLISHMENT AND ANNULMENT—PROBATE—PROCEDURE—PETITION—SUFFICIENCY OF PETITION FOR PROOF OF NUNCUPATIVE WILL. See *Matter of O'Connor*. 319

7. SAME—REVOCATION AND ALTERATION—RIGHT TO REVOKE OR ALTER AND HOW ACCOMPLISHED—INTENTION SHOWN BY EXECUTION OF SECOND WILL.
A will containing no revocation clause revokes all prior wills of the testator if it is inconsistent therewith and disposes of his entire estate. *Matter of Gilman*. 325

8. SAME—THE TESTAMENTARY INSTRUMENT OR ACT—EXECUTION OF WILL—EVIDENCE OF EXECUTION—SUFFICIENCY OF EVIDENCE—TESTIMONY OF SUBSCRIBING WITNESSES,

Where a will is followed by a full and explicit attestation clause and the signatures of the testatrix and the witnesses are subscribed in the proper place, and, upon the proceedings for probate, a subscribing witness testifies that the testatrix at the time of its execution neither declared the instrument to be her will nor requested the witnesses to sign as such, but it is apparent his memory was uncertain and unreliable, and nineteen years have elapsed since the execution of the will, and it was drawn by the husband of the decedent, an attorney of forty years' experience, who knew the statutory requirements and appended the attestation clause and was present and superintended the execution, and there is no evidence of fraud or undue influence, the instrument will be admitted to probate. *Matter of Walker*..... 427

9. SAME—REQUISITES, FORM AND VALIDITY—SIGNATURE AT END OF WILL—EXECUTION OF WILL—EVIDENCE OF EXECUTION—PUBLICATION—REQUEST.

Where a testatrix writes her name in a blank space left for that purpose in the body of the attestation clause immediately following her holographic will, she has subscribed the will at the end thereof within the meaning of the statute.

And where, having produced the instrument in question before the subscribing witnesses, the testatrix converses with them about it in such a manner as to indicate clearly the nature of the instrument, and, after signing herself in the presence of the witnesses, hands the pen to one of them who signs the attestation clause and then hands the pen to the other who thereupon signs his name in like manner, a

sufficient publication of the will and request to the witnesses to sign as such is shown. *Matter of De Hart*..... 436

10. SAME—EXECUTION OF WILL—SUFFICIENCY OF ATTESTATION.

Where at the time the signatures of the testator and witnesses were subscribed to an instrument it was not properly executed and attested as a will, but thereafter, as a new transaction, the testator acknowledged his signature, declared his will and requested the witnesses to attest the same and the witnesses, thereupon, to the knowledge of the testator, acceded to his request and adopted their previous signatures as an attestation of the transaction, they may be held to have signed them as subscribing witnesses within the requirements of the statute. *Matter of Karrer*. 169

11. SAME—EXECUTION OF WILL—IN GENERAL—PRESENCE OF WITNESSES—PUBLICATION OR TESTAMENTARY DECLARATION.

Where as to one of the subscribing witnesses to a will drawn upon a printed blank there was a compliance with the statutory requirements, and thereafter the testator presented the paper with his signature upon it to his brother, the other witness, and asked him to witness his signature, which he did, but there was no declaration then that the instrument was a will, nor any circumstance from which such a declaration could be implied; and where after remaining together about an hour they went to luncheon together and at the table the testator told his brother that the paper was his will, to which the brother made no reply and did not again see the paper, the request previously made was not exhausted at the moment of its utterance but reached forward and joining itself to the declaration when made validated the execution of the instrument. *Matter of Baldwin*..... 469

12. SAME—EXECUTION OF WILL—IN GENERAL—SIGNATURE—PLACE FOR SIGNATURE—SIGNATURE OF WITNESSES.

Where a will is drawn on a printed blank and in the body of it are written the words "continued on other side," where the directions for the disposition of the testator's estate are written, and the testator signs his name at the beginning, in the space intended for a recital of his name, and again at the bottom of the second page, but does not sign in the place intended for his signature but a notary public who supervised the execution of the instrument signed there, and the attestation clause follows the notary's signature, the provisions of the statute have not been substantially complied with and the will should not be admitted to probate. *Matter of Schlegel*..... 112

13. SAME—EXECUTION OF WILL—EVIDENCE OF EXECUTION—SUFFICIENCY OF EVIDENCE—PUBLICATION.

Where a will was read aloud to the testator in the presence of both witnesses and the will contained a statement that the testator declared "herewith in the presence of the two undersigned witnesses"

that after his death a person named should "inherit whatever estate" he had; and where the testator thereupon signed the will and the witnesses thereupon signed their names thereto, there is sufficient evidence of publication and request by the testator that the witnesses subscribe the instrument. *Matter of Luthgen*..... 23

14. SAME—EXECUTION OF WILL—EVIDENCE OF EXECUTION—SUFFICIENCY OF EVIDENCE.

Where an instrument offered for probate has no attestation clause and it appears that the testator was a miller and the witnesses were engaged in trade or manufacture and none of them are shown to have had knowledge of the requirements necessary for the due execution of a will and the proof stops with *prima facie* evidence of the genuineness of the signatures of the testator and the subscribing witnesses and that the instrument was in the handwriting of the deceased, the proof fails to establish facts showing due execution and publication of the instrument as a last will and testament, and probate will be denied. *Matter of Neary*. 42

15. SAME—REVOCATION AND ALTERATION—RIGHT AND HOW ACCOMPLISHED—CANCELLATION—BY THIRD PERSON—PROBATE, ESTABLISHMENT AND ANNULMENT—PROBATE—IN GENERAL—ESTABLISHMENT OF LOSS OR FRAUDULENTLY DESTROYED WILL. See *Matter of Hughes*..... 14

16. INTERPRETATION AND CONSTRUCTION—DISPOSAL OF THE ENTIRE ESTATE—EFFECT OF DEATH, UNCERTAINTY OR INVALIDITY OR INCAPACITY OF LEGATEES OR DEVISEES—EFFECT OF DEATH OF BENEFICIARY IN LIFE OF TESTATOR—OF LEGATEE OF SHARE IN RESIDUE.

Where a testator, in disposing of his residuary estate, gave two-thirds thereof to A. and the other one-third thereof to B., and B. died before the testator, the latter's share does not pass to A. under the will but remains undisposed of by testamentary disposition. *Matter of Kings Co. Trust Co.*..... 588

17. SAME—DISPOSAL OF THE ENTIRE ESTATE—EFFECT OF DEATH, UNCERTAINTY, ETC.—LEGACIES DEPENDENT ON DECEASE OF ANOTHER.

Where testator devised his residuary estate in trust for his wife during life, with power to use the principal, and directed that upon her death the remainder of the estate should be converted into money and, after a legacy to a niece of his wife and one to his nephew, the estate was given to testator's six children, and the will declares that none of the legacies shall vest until after the decease of testator's wife, the legacy to the niece, who predeceased her, lapsed and returned to the general estate. *Matter of Denham*..... 18

18. SAME—EFFECT OF DEATH, UNCERTAINTY OR INVALIDITY OR INCAPACITY OF LEGATEES OR DEVISEES—EFFECT OF DEATH OF BENEFICIARY IN LIFE OF TESTATOR—OF LEGATEE OF SHARE IN RESIDUE—DISPOSAL OF LAPSED OR VOID DEVISES OR REQUESTS, OR OF OTHERWISE UNDISPOSED PROPERTY—LAPSED, VOID OR INEFFECTUAL GIFTS. See *Matter of Barrett*..... 188

19. SAME—DESIGNATIONS AND DESCRIPTIONS OF PERSONS, OBJECTS, AND PURPOSES—RULES AND IMPLICATIONS—WORDS DESCRIPTIVE OF A CLASS.

Where a testator, in disposing of the remainder of his estate upon the death of the life tenant, provides that it shall be divided *pro rata* between his legatees named in certain articles of his will; and where, if it be taken to have been his intention by the use of the word "legatees" to indicate the five persons named in his will as such, the result will follow that his bequest will be ineffectual to dispose of his entire estate; and where if he had so intended he could easily have called them by name; and where in another clause providing for abatement of legacies a certain process of proportion was ordained necessarily applicable only to the beneficiaries who survived him, it ought rather to be inferred he intended by "legatees" only those who survived him and thus became legatees in the proper import of the term. *Matter of Hoffman*. 474

20. SAME—TERMS CREATING LEGACIES AND GIFTS OF INCOME, INTEREST, SUPPORT AND RELEASES OF DEBTS—RULES AND IMPLICATIONS—GENERAL DEMONSTRATIVE OR SPECIFIC CHARACTER OF LEGACIES—EXPENSES OF THE ESTATE, CHARGES, ADVANCES AND PAYMENT OF DEBTS AND LEGACIES—RULES AND IMPLICATIONS—IMPLIED LIABILITY OF DEMONSTRATIVE LEGACIES.

A gift by a testatrix to her infant children of her house and lot, coupled with the direction "and from the money which I have in bank to pay off the mortgages against my said house and lot as soon after my death as possible," is to be construed as constituting a demonstrative legacy of such moneys to the extent required for the payment of the mortgages; and, where the fund is inadequate for the purpose and there are no personal assets, the expenses of administration must first be paid therefrom and the balance must then be applied to the purpose indicated. *Matter of Bedford*. 463

21. SAME—DESIGNATIONS AND DESCRIPTIONS OF PROPERTY, FUNDS, ETC.—PARTICULAR TERMS OF DOUBTFUL MEANING—CHARGES MADE AGAINST LEGATEE.

A gift to a legatee of one-third of the testatrix's cash, bonds and mortgages, "less the sum of three thousand dollars which sum of three thousand dollars I charge him in full satisfaction" of certain advances previously made, cannot be taken as establishing an indebtedness in favor of the testatrix so as to cut down a gift to the same legatee in a later part of the will, where the testatrix leaves no cash, bonds and mortgages from which said amount of three thousand dollars can be deducted. *Matter of Stapleton*. 461

22. SAME—PARTICULAR TERMS OF DOUBTFUL MEANING—HEIRS—UNDER BEQUESTS OF PERSONAL PROPERTY.

The word "heirs," when used in connection with personal property,

means the next of kin of a decedent or those related by blood who take the personal estate of an intestate.

Where a legacy is given to the "legal heirs" of one, in consideration of her services to testator as housekeeper, her husband is excluded from sharing in the legacy; and it must be distributed among those related by blood to the housekeeper, or her legal next of kin, according to the degree of relationship.

The executor of the Housekeeper is entitled to receive the income from the legacy from the date of the last payment to her of the income to the time of her death. *Matter of Schnitzler*..... 26

23. SAME—RULES AND IMPLICATIONS—WORDS DESCRIPTIVE OF A CLASS—"NIECE" AS NOT INCLUDING BROTHER'S ADOPTED DAUGHTER.

Where a testator gave the residue of his estate to his "nephews and nieces (children of my brothers and sister), share and share alike," it is to be presumed that he intended nephews and nieces by birth only and not an adopted daughter of a deceased brother, in the absence of knowledge upon his part of the fact of such adoption. *Matter of Haight*. 213

24. SAME—EXPENSES OF THE ESTATE—CHARGES, ETC., AND LEGACIES—RULES AND IMPLICATIONS—IMPLIED CHARGES ON LAND.

Money legacies are primarily payable from the personal estate and remain so unless the will manifests an intention to charge them upon the real estate.

Where, at the time of the execution of a will of one owning no real property, her personal estate amounted to about \$14,000 and the legacies to \$7,700, and no intention to charge the payment thereof upon real estate of which testatrix died seized appears from the will, the personal estate should be applied toward the payment of the legacies ratably. *Matter of Thomas*..... 20

25. SAME—TERMS FIXING PLURALITY OR SEVERALTY OF OWNERSHIP OR RIGHT—PARTICULAR WORDS OF DOUBTFUL MEANING—GIFTS TO ONE AND CHILDREN OF ANOTHER EQUALLY—PER STIRPES OR PER CAPITA—DISPOSAL OF THE ENTIRE ESTATE—EFFECT OF DEATH, UNCERTAINTY OR INVALIDITY OR INCAPACITY OF LEGATEES OR DEVISEES—EFFECT OF DEATH OF BENEFICIARY IN LIFE OF TESTATOR—DEATH OF REMAINDERMEN OR OTHER PERSONS TO TAKE IN FUTURE. See *Matter of Kleeman*..... 45

26. SAME—TERMS DEFINING THE NATURE AND QUALITY OF ESTATES OR INTERESTS—FUTURE INTERESTS AND VESTING POSSESSION AND ENJOYMENT—GENERAL RULE AS TO VESTING—BEQUESTS AT A FUTURE TIME OR ON FUTURE EVENT. See *Matter of Salisbury*..... 34

27. SAME—TERMS FIXING PLURALITY OR SEVERALTY OF OWNERSHIP OR RIGHT—PARTICULAR TERMS OF DOUBTFUL MEANING—GIFTS TO SEVERAL—AS A CLASS OR AS INDIVIDUALS.

Where a testator directs his estate to be converted and divided equally among certain nephews and nieces named, the legatees do not

take as joint tenants and the gifts to those who died before the testator lapsed, and, in the absence of any other testamentary disposition, are distributable to the testator's next of kin. *Matter of Farmers' Loan & Trust Co.* 554

28. SAME—TERMS FIXING PLURALITY OR SEVERALTY OF OWNERSHIP OR RIGHT
—PARTICULAR WORDS OF DOUBTFUL MEANING—GIFTS TO "HEIRS," ETC.
—PER STIRPES OR PER CAPITA.

Where a testator leaves his residuary estate, one-third thereof to the heirs of his three sisters, adding the words "to be divided among them *per capita* as well as *per stirpes*, equally, and in all respects, share and share alike," a *per capita* division among the heirs of one of the sisters consisting of a daughter and seven children of a deceased daughter was not intended; but the surviving daughter will take one-half of her mother's share and the other half will be divided *per capita* among the children of the deceased daughter. *Matter of Curtis.* 279

29. SAME—TERMS DEFINING QUANTUM OR DURATION OF ESTATES OR INTERESTS—RULES AND IMPLICATIONS—SUBSEQUENT CLAUSES REDUCING FEE.

Under a will by which the testator provides: "I give, devise and bequeath all my property, real and personal and wheresoever situated to my wife (naming her) and after her death the same shall go to my daughter (naming her)," the testator will be deemed to have intended his wife to have a life estate only, with remainder to his daughter; and upon the wife's death the daughter takes under her father's will, and there is no taxable transfer to her from her mother. *Matter of Whitney.* 578

30. SAME—DISPOSAL OF THE ENTIRE ESTATE—EFFECT OF DEATH, UNCERTAINTY OR INVALIDITY OR INCAPACITY OF LEGATEES OR DEVISEES—ACCELERATION OF SUBSTITUTIONAL OR SECONDARY ESTATES. See *Matter of Hoffman.* 306

31. SAME—CONDITIONS, CONTINGENCIES AND ALTERNATIVES—PARTICULAR TERMS OF DOUBTFUL MEANING—BECOMING "FINANCIALLY SOLVENT."

Where, under the will of a testator, a trust fund is directed to be paid over to the beneficiary whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of the trust fund, and the beneficiary, after the testator's death, upon his voluntary petition in bankruptcy, is discharged from all his debts, he is thereby brought within the language of the will and entitled to receive the fund. *Matter of Farmers' L. & T. Co.* 334

32. SAME—RULES AND IMPLICATIONS—INTENTION TO CUT OFF DOWER.

The devise by a testator of his real estate to his executors, in trust to receive and apply the income to the use of persons other than his widow, and a power of sale incidental thereto, are not inconsistent with

a claim of dower on the part of his widow; and the gift to the widow of all his personal estate is not enough from which to infer an intention that it was to be in lieu of dower.

In such a case, in appraising the testator's real estate for the purposes of the transfer tax, the value of the widow's dower should be deducted.

If an expenditure for broker's commissions should appear to be reasonably required upon the sale of the real estate by the executors, it should be deducted as well as the commissions of the executors as trustees under the will. *Matter of Shields*..... 538

33. SAME—ABATEMENT—ORDER OF ABATEMENT.

Where a testator's estate is insufficient to pay in full a legacy to his stepson, an incompetent, a legacy to one of three persons who might become his committee and guardian, and a legacy to a cemetery association in trust to apply the income to the repair and preservation of the family monument and burial lot, the estate will be applied proportionally in payment of these legacies. *Matter of Dougherty*.... 247

34. SAME—NATURE AND QUALITY OF ESTATES—TRUSTS OR INDIVIDUAL INTERESTS—TRUSTS IMPLIED—FROM PRECATORY WORDS.

Where testator gave the residue of his estate to his executors for their use and benefit, with a request to them that a portion thereof be used for masses for the repose of his soul and the balance to be given to some deserving charity, the prayer that the residue be devoted to the uses mentioned rests only upon the conscience of the legatees and does not impair the personal quality of their ownership. *Matter of O'Regan*. 123

35. SAME—TERMS CREATING LEGACIES AND GIFTS OF INCOME, INTEREST, SUPPORT AND RELEASES OF DEBTS—RULES AND IMPLICATIONS—LEGACIES FOR SUPPORT. See *Matter of Harris*..... 49

36. SAME—EXPENSES OF THE ESTATE, CHARGES, ADVANCES AND PAYMENT OF DEBTS AND LEGACIES—RULES AND IMPLICATIONS—IMPLIED CHARGES ON LAND—DEFICIENCY OF PERSONALTY. See *Matter of Stiles*..... 290

37. SAME—DISPOSAL OF THE ENTIRE ESTATE—DISPOSAL OF LAPSED OR VOID DEVISES OR BEQUESTS OR OF OTHERWISE UNDISPOSED PROPERTY—INCOME NOT DISPOSED OF. See *Matter of Martinus*..... 315

38. SAME—TERMS DEFINING THE NATURE AND QUALITY OF ESTATES OR INTERESTS—FUTURE INTERESTS AND VESTING, POSSESSION AND ENJOYMENT—DIRECTIONS FOR A DIVISION. See *Matter of Time*..... 140

39. SAME—ADEMPTION, REVOCATION AND SATISFACTION—SURRENDERING EVIDENCE OF LEGATEE'S DEBT AS SATISFACTION.

Where the son of a testator had of his father money for which interest bearing promissory notes were given upon which the son paid interest from time to time for several years down to the time when the notes were surrendered to him by his father, the transaction must be interpreted as a loan.

And if nothing appears indicating an intention to convert the loan into an advancement, the amount may not be set off against a legacy left to the son by the father in his will.

Even if the original loan was intended to be an advancement, the father's subsequent conduct in delivering to his son the notes he had taken, accompanied by declarations only consistent with his intention to treat the notes as no longer a part of his estate or an indebtedness against his son, would prevent their being treated as an advancement. *Matter of Bennington*. 505

See ACCUMULATION; ATTESTATION; BEQUEST FOR MASSES; CHARITIES; EVIDENCE; LEGACY.

WITNESSES.

DISQUALIFICATION BY REASON OF CONFIDENTIAL RELATION—BETWEEN ATTORNEY AND CLIENT—EXECUTION OF WILL—WAIVER OF PRIVILEGE.

In the absence of proof that the nature of a will was referred to in the presence of others at the time of its execution, the testimony of the testator's attorney, who drew the will but did not witness it, as to his remembrance of its contents is inadmissible, under section 835 of the Code of Civil Procedure, as calling for knowledge derived from a communication made by the client in the course of the attorney's professional employment.

The fact of publication of the will to the subscribing witnesses in the presence of the attorney does not constitute a waiver of the prohibition of said section 835. *Matter of Cunnion*. 31

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